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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Broadcast Music, Inc. ("BMI") and the named representatives of the defendant class of writers and publishers of music who have entered into agreements with BMI to license performance rights to their works[1] respectfully petition for a writ of certiorari to review so much of the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on August 8, 1977, as reversed the decision of the district court granting judgment to defendants.

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1. Paul Anka, Jerry Bock, Fred Ebb, Norman Gimbel, Sheldon Harnick, John Kander, Charles Koppelman, Don Rubin, Joseph Stein, Al Gallico Music Corp., Associated Music Publishers, Inc., Duchess Music Corp., Edward B. Marks Music Corp., Hill and Range Songs, Inc., Hollis Music, Inc., Maclen Music, Inc., Peer International Corp., Screen Gems-Columbia Music, Inc., Sunbeam Music, Inc. and Unart Music Corp.

OPINIONS BELOW

The majority and separate opinions of the court of appeals are reported at 562 F.2d 130. Upon the denial of petitions for rehearing Judge Moore issued an opinion which is unreported. The opinion of the district court dismissing the complaint after a full trial on the liability issues is reported at 400 F. Supp. 737. These opinions are reprinted in a separate Appendix to this Petition.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1977. A timely petition for rehearing and suggestion for rehearing in banc was denied on December 6, 1977. On February 17, 1978, Mr. Justice Marshall extended the time to file this petition until May 5, 1978. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

BMI, a corporation which is not owned or operated by writers or publishers, is a middleman in the business of licensing copyrighted musical compositions for public performance. BMI has entered into agreements with thousands of writers and publishers of music giving BMI rights to grant public performance licenses to their compositions. Thousands of users of music have negotiated with BMI for "blanket" licenses under which they obtain the right to use all the compositions in the BMI repertory in return for a flat fee or a percentage of designated receipts. A user is

free to obtain licenses to perform music in the BMI repertory directly from writers and publishers and need not obtain licenses from BMI.

The Second Circuit held that the offering of blanket licenses constituted price fixing and copyright misuse. The questions presented by the Second Circuit's decision as to these petitioners are:

1. Whether writers and publishers of music and the independent middleman through which they have licensed their copyrighted musical compositions for public performance can be found to have engaged in price fixing in violation of the Sherman Act in the absence of any agreement between the middleman and the writers and publishers as to the price that any licensee would be charged?

2. Whether it is per se illegal to offer blanket licenses to perform large numbers of musical compositions, when consent decrees negotiated by the Department of Justice require that such licenses be offered, and when such licenses have been found to avoid the practical problems of composers in monitoring the fleeting and scattered uses of their works and the difficulties of users in locating and negotiating with the numerous and widely dispersed creators of the works they wish to use?

3. Whether it is copyright misuse for some fifty thousand writers and publishers to enter into agreements with an independent middleman who in turn grants blanket licenses for the public performance of their compositions, where the copyright owners are also prepared to grant individual licenses directly to any user electing not to take a blanket license, and where blanket licenses are found to constitute a reasonable solution to the unique distribution and supply problems in the business of performance rights licensing?

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides, in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . ."

STATEMENT OF THE CASE

The Parties

Petitioner BMI, a defendant below, is a corporation founded in 1939.[2] BMI has negotiated agreements with many thousands of writers and publishers of music to license their music and currently has such agreements with more than 33,000 writers and more than 16,000 publishing companies (hereinafter sometimes referred to as BMI "affiliates"). Certain of these writers and publishers were named in the complaint as representatives of the defendant class of BMI affiliates and are also petitioners herein.

2. BMI's stock is owned by approximately 485 local broadcasters. (A.2a, 27a; references to "A. " are to pages of the separate Appendix to this Petition.)

American Society of Composers, Authors and Publishers ("ASCAP"), a defendant below, is a membership organization of writers and publishers of music which was founded in 1914. (A.25a-27a.) Certain ASCAP members were named in the complaint as representatives of the defendant class of ASCAP members. ASCAP and these ASCAP members are filing a separate petition for review of the judgment below.

Respondent Columbia Broadcasting System, Inc. ("CBS"), the plaintiff below, operates one of the three national television networks. CBS supplies programs to some 200 affiliated television stations and to its five wholly-owned television stations. A giant in the entertainment industry, CBS also owns and operates fourteen radio stations, one of the four national radio networks, the world's largest record company, and several music publishing companies which either are members of ASCAP or have agreements with BMI. (A.27a-28a, 58a-59a, 90a, 93a.)

BMI Agreements with Writers and Publishers

Each of the agreements BMI has negotiated with writers and publishers gives BMI a right to issue licenses to perform the copyrighted works of the writer or publisher. In return, BMI has agreed to make license payments to each affiliate as calculated under formulae established from time to time by BMI.[3]

Under the terms of the consent decree entered in *United States* v. *Broadcast Music, Inc.*, 64 Civ. 3787 (S.D.N.Y. December 29, 1966) (the "BMI Decree"), BMI must also permit writers and publishers to issue performance licenses

3. All of BMI's income, after expenses and provision for reserves, is paid out to its writer and publisher affiliates. (A.27a.)

directly to users.[4] The court of appeals affirmed the district court's finding that BMI's affiliates can, and would if CBS asked, negotiate and issue performance licenses directly to CBS. (A.8a-10a, 111a-120a.)

BMI Blanket Licenses

A blanket license from BMI gives the licensee the right to perform any of the more than one million compositions in the BMI repertory, without advance notice and any number of times during the term of the license, in return for a flat dollar amount or a fee expressed as a percentage of designated receipts. (A.3a, 6a, 25a-26a.)

The fee charged by BMI for a blanket license is exclusively a matter for negotiation between BMI and music users. Writers and publishers who agree to permit BMI to license their works do not participate in BMI's determination as to what price BMI will seek from users or in any other licensing decision. BMI is not a membership organization of writers and publishers; BMI is owned by its stockholders, and writers and publishers play no role in its management. (A.2a, 27a.)

Blanket Licensing and the Music Business

The market for performance rights to copyrighted music is a vast and complex one. In this country alone, there are more than 80,000 writers and publishers of music holding copyrights on millions of compositions. Obtaining per-

4. ASCAP, as required by its consent decree, obtains only a nonexclusive right from its members to license their compositions. (A.6a.) Although the form of the BMI Decree differs from the form of ASCAP's decree, as the district court stated, "the parties have stipulated that CBS could secure direct licenses from BMI affiliates with the same ease or difficulty . . . as from ASCAP members." (A.33a.)

formance rights to these compositions and the works of foreign composers as well[5] is an important part of the successful operation of a huge entertainment industry made up of many thousands of separate operations ranging in size from local bars to nationwide television networks.

Performing rights organizations have developed throughout the world in response to the unique problems presented by the performing rights market. Public performances of music are so fleeting, and music users so numerous and widely scattered, that no individual copyright holder could hope to detect and collect for all unauthorized uses of his work. On the other hand, most music users desiring both to perform a variety of music and to avoid copyright infringement would face severe practical difficulties in obtaining direct licenses to the works they wished to perform. Freedom of choice in the selection of music might be achieved, if at all, only at great expense if it were necessary to identify and contact the copyright owners each time a particular work was selected for performance.

Blanket licensing of performance rights by organizations such as ASCAP and BMI arose in response to these market needs, and it continues to serve these salutary purposes today.[6] (A.25a-26a.) As the district court stated:

5. BMI and ASCAP have reciprocal licensing arrangements with organizations from nearly 40 countries, including every major country in the world except China. The world-wide adverse effect of the Second Circuit's opinion is discussed in an amicus curiae brief to be filed herein by The Performing Right Society Limited and Société des Auteurs, Compositeurs et Editeurs de Musique, the British and French performing rights organizations.

6. Congress has given express statutory recognition to the role of the performing rights organizations in the Copyright Act of 1976, which became effective on January 1, 1978. In 17 U.S.C. § 116, the section of the Act providing for compulsory licenses for jukeboxes, the Copyright Royalty Tribunal is directed to distribute all jukebox

(footnote continued on next page)

> "Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary . . . . Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is 'automatically' covered by the blanket license." (A.26a.)

By acquiring rights to license performance rights from numerous copyright owners and offering these rights for sale, in bulk, to music users, BMI acts as an ordinary middleman. BMI provides both to the writers and publishers and to those who desire to use their music an alternative method of distribution and supply which enables them to avoid the prohibitive transaction costs—measured both in money and in quality of product—that direct negotiation would so often entail.

For virtually its entire existence, BMI's operations have been regulated by consent decrees negotiated with the Department of Justice. ASCAP's operations have been subject to consent decree since 1941. The decrees now in effect have for many years required both BMI and ASCAP to offer blanket licenses. (A.4a-7a, 29a-33a.)

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royalty fees to which copyright owners unaffiliated with a performing rights organization do not prove entitlement, to the performing rights organizations; BMI, ASCAP and SESAC, Inc. are mentioned by name.

In 17 U.S.C. § 111, Congress established government-sponsored blanket licensing for certain secondary transmissions of cable television systems, with fees based on each system's gross receipts. The House Report on the bill indicates that blanket licensing was chosen because

> "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

Prior Proceedings

CBS has held blanket licenses since commercial television began. Indeed, CBS led the group of broadcasters which founded BMI in 1939 and caused it to issue its first blanket licenses. (A.2a, 27a-28a, 51a.)

On December 31, 1969, following a breakdown in negotiations for the renewal of its BMI blanket license, CBS filed the complaint in this action, seeking declaratory and injunctive relief.[7] (A.52a-54a.) CBS alleged that it had been compelled to accept blanket licenses (although it was BMI, not CBS, which had terminated the existing blanket license and although CBS had never prior to BMI's notice of termination objected to a blanket license (A.52a-54a, 79a)), and argued that the offering of such licenses by BMI and ASCAP constituted tying, boycotting, price fixing, monopolization and misuse in violation of the antitrust and copyright laws. (A.33a-34a.)

CBS sought to require BMI to offer a new type of license in which BMI would be required to fix a price level for each type of use of a composition in its repertory. Alternatively, CBS requested an order enjoining BMI from offering blanket licenses to any of the television networks. (A.3a, 25a, 38a.)

In 1973, following extensive discovery, a twenty-nine day trial on issues of liability was held before Judge Morris E. Lasker of the Southern District of New York. Every aspect of music licensing was examined in depth at the trial.

Upon careful evaluation of the mass of evidence before him, Judge Lasker held that the offering of blanket licenses by ASCAP and BMI did not unreasonably restrain trade and did not otherwise violate the antitrust or copyright laws.

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7. CBS invoked the jurisdiction of the district court under 15 U.S.C. § 26 and 28 U.S.C. §§ 1331(a), 1337 and 1338(a).

(A.114a-121a.) The district court found that most music used on CBS' television network was composed especially for the program on which it is performed and that, as to other music, composers and publishers were eager to have it performed on nationwide television. (A.56a-61a, 69a-71a, 84a-85a, 90a-91a, 112a.) The court concluded that copyright proprietors "would deal readily on a price basis . . . ." (A.120a.) Accordingly, since the offering of blanket licenses was found not to obstruct CBS' acquisition of licenses directly from the copyright owners, the district court entered judgment in favor of the defendants.

On August 8, 1977, the Second Circuit reversed the district court in part. While the court of appeals upheld the dismissal of most of CBS' antitrust claims and did not disturb *any* of the district court's findings of fact, Judges Gurfein and Anderson joined in ruling that, "with respect to the television networks," the offering of blanket licenses constituted per se unlawful price fixing. (A.21a.) In addition, in the last sentence of its final footnote, the court added, without elaboration, that the offering of blanket licenses also constituted copyright misuse.[8] (A.23a.)

REASONS FOR GRANTING THE WRIT

This petition should be granted because of the significant impact of the decision below on antitrust theory, on the creators of music throughout the world, and on government enforcement of the antitrust laws:

First, with what has been described as a "hasty" application of the per se rule,[9] the court held that the practices of each of the major licensing organizations—ASCAP and BMI—constituted price fixing, even though the court's reasoning had no application whatever to BMI. The holding that BMI is a price fixer would make the ordinary business operations of every independent wholesaler or middleman per se unlawful.

Second, the court applied rules of per se illegality without disturbing any of the extensive findings by the district court that the offering of blanket licenses created no unreasonable restraint. Indeed, the Second Circuit itself conceded that the blanket license offered was *not* a "'naked restraint.'" (A.22a.)

Third, having precipitately applied a per se rule to a case that required rule of reason analysis, the court tried to accommodate the obvious indicia of reasonableness that permeated the trial record by doing further violence to per se doctrine: although the offering of blanket licenses was held per se unlawful, the Second Circuit ruled that blanket licensing need not be prohibited, but might continue if ASCAP and BMI were required to offer another form of license as well. (A.21a-22a.) But if the Second Circuit were correct that blanket licensing was price fixing and copyright misuse, the new per use license ordered by the court would be an even clearer case of price fixing and misuse.

Fourth, relying on its erroneous price fixing rationale and giving no attention to copyright policy questions or equitable considerations, the Second Circuit unjustifiably held that the copyrights on all compositions available through BMI or ASCAP have been misused—thus casting a

8. In a rather puzzling concurring opinion, Judge Moore appeared to disagree that blanket licensing constituted price fixing but agreed that there should be a remand. (A.23a.)

9. Case Comment, 91 Harv. L. Rev. 488 (1977).

cloud on the enforceability in the United States of virtually every musical copyright in the world. It is reported that since the Second Circuit's decision CBS has already ceased to pay ASCAP for the use of music on CBS' television network. That alone represents a loss of income to writers and publishers of more than $4 million per year. If other users follow suit, the impact will be devastating.

Fifth, the decision of the Second Circuit that the offering of blanket licenses by BMI and ASCAP constitutes price fixing is in conflict with the decision of the Ninth Circuit in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). In *K-91*, the Ninth Circuit held that ASCAP's offering of blanket licenses was not price fixing and did not otherwise violate Section 1 of the Sherman Act. For the reasons stated in ASCAP's petition for certiorari herein, the decisions cannot be reconciled.

Finally, the Second Circuit's decision substantially reduces the utility of consent decrees when it holds that conduct affirmatively required by the Department of Justice in long-standing consent decrees is unlawful per se.[10] Surely there should be a presumption that the Department of Justice has not required practices which have a

> "pernicious effect on competition and lack . . . any redeeming virtue . . . ." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958).

10. The BMI and ASCAP consent decrees permit the offering of blanket licenses in general and affirmatively require the offering of a form of blanket license (the per program license) under which payments are made only with respect to programs using licensed music. (A.6a-7a, 29a-32a.) At oral argument in the court of appeals, Judge Gurfein, speaking of the 1950 ASCAP decree, noted,

> "It is ordered in the decree to do certain things—that is, to give a blanket license." (Tr. 7)

While a private litigant is free to challenge practices authorized by a consent decree, *see Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961), practices required by a decree clearly ought to be evaluated under the rule of reason.[11]

The Department of Justice having required the conduct that was here held per se unlawful, the interests of the United States are very much involved in the disposition of this case. Apparently recognizing this, the court of appeals suggested that the district court invite the Department of Justice to participate or express its views on remand. (A.22a.) Ten years ago this Court, in considering the petition for certiorari in *K-91, Inc.* v. *Gershwin Publishing Corp., supra,* invited the Solicitor General to submit the views of the United States. 389 U.S. 805 (1967). The Solicitor General filed a brief supporting the conclusion of the Ninth Circuit that ASCAP's offering of blanket licenses was not price fixing, and this Court allowed the decision to stand. Once again the question whether blanket licensing constitutes price fixing is presented. We respectfully suggest that this Court again invite the Solicitor General to express the views of the United States.

11. *Cf. Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), declining to apply per se rules where practices were undertaken in context of legislative regulation.

I.

THE SECOND CIRCUIT'S PRICE FIXING RATIONALE HAS NO APPLICATION TO BMI AND THE THOUSANDS OF WRITERS AND PUBLISHERS WHOSE WORKS ARE LICENSED BY BMI.

The nearly fifty thousand writers and publishers who license their works to BMI have been branded price fixers and held guilty of misusing the copyrights on which the livelihoods of many of them depend—on a theory that has no application whatever to their conduct.

The Second Circuit's price fixing rationale is entirely dependent on the nature of ASCAP as a membership organization of writers and publishers.[12] The court looked at the ASCAP organization and saw horizontal agreements on division of the proceeds of the blanket license. It concluded that such agreements would improperly affect prices at which direct licensing transactions would occur, because

> "the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition." (A.11a; footnote omitted.)

Necessarily, any decision made by ASCAP on dividing fees is a decision by otherwise competing writers and publishers.

Writers and publishers who license through BMI, however, are in an entirely different position. They have not agreed among themselves. Each has independently entered into an agreement with BMI under which BMI has agreed to make payments to him for his work; these payments bear no direct relationship to the amount BMI receives from

12. Although BMI's structure and ownership are entirely different from ASCAP's, the court stated in a footnote that references to ASCAP should be taken to include BMI. (A.2a.)

CBS or any other licensee. Writers and publishers have no ownership interest in BMI and no control over its policies. Writers and publishers dealing with BMI have done no more than enter into agreements with a wholesaler or middleman interested in licensing their works. And BMI has negotiated independently with users on the price for what it licenses.

BMI is no more a price fixer than is a wholesaler of eggs who buys eggs separately from a number of farmers and sells them together to a supermarket chain. If the supermarket chain did not like the wholesaler's price, it could hire a man and a truck to go around to the farmers and make direct purchases. Doubtless the chain could obtain lower prices from the farmers than it paid to the wholesaler, but the direct purchases would make economic sense only if the price differential were sufficient to pay for the man and the truck.

As the district court found, CBS is free today to seek licenses directly from copyright owners, and copyright owners would eagerly grant such licenses. (A.69a-72a, 84a-85a, 90a-91a.) BMI exercises no control over the market; it has succeeded in issuing licenses only because users regard the blanket license as a less expensive alternative than collecting direct licenses with their attendant transaction costs. (A.119a-120a.)

To be sure, the price of a BMI license—like any other price in a market—has an effect on what would be charged in direct licensing transactions. The effect, however, is procompetitive rather than anticompetitive. The blanket license is an alternative means of securing the desired products—rights to perform copyrighted music. Thus, the price of a blanket license acts as a check on direct license prices, since users can select a blanket license if direct license prices are too high.

In overwhelmingly selecting blanket licenses (A.26a), users have given clear indication that blanket licenses are less expensive and more efficient than any other kind of license. We are aware of no other case which in the name of antitrust has outlawed a competitive alternative, let alone the least expensive and most efficient alternative.

II.

THE SECOND CIRCUIT'S DECISION SERIOUSLY DISTORTS THE ROLE OF PER SE RULES.

This Court has reserved per se rules for only those practices "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . ." *National Society of Professional Engineers* v. *United States,* 46 U.S.L.W. 4356, 4359 (U.S. April 25, 1978) (No. 76-1767). Thus, "*per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 49-50 (1977). When the conduct is comprised of "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed," per se analysis is inappropriate. *National Society of Professional Engineers* v. *United States, supra.* The per se concept is designed to provide predictability and to permit obviously anticompetitive practices to be enjoined without the need for a full-scale trial. *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958). The court of appeals' decision is contrary to the teaching of this Court and achieves none of the goals of per se analysis.

The threshold question in determining whether or not to classify a practice as per se illegal is whether or not the court has sufficient information about

> "the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue'. . . ."

White Motor Co. v. *United States,* 372 U.S. 253, 263 (1963), quoting *Northern Pacific Railway Co.* v. *United States, supra,* 356 U.S. at 5.

There was no reason in the present case for the Second Circuit to believe that it had the required knowledge as to the impact of the offering of blanket licenses, since it recognized that the music licensing industry is "*sui generis*" and that "the practical complexities of licensing musical nondramatic performing rights can find no precise analogy anywhere."[13] (A.3a-4a.) The court, however, accepted without analysis CBS' claim that blanket licensing had the effect of "fixing" the prices that would be asked in direct licensing transactions, and ruled that blanket licensing is thus per se unlawful. (A.11a-12a, 13a.) While the court

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13. As this Court has recognized, per se rules are general and inflexible rules which may not lead to appropriate results if applied to unusual fact situations. *See, e.g. Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 50 n.16 (1977). In a number of cases presenting unusual fact situations, practices apparently vulnerable if judged by per se rules have been tested—and sustained—on a rule of reason basis. *See, e.g., United States* v. *Citizens & S. Nat'l Bank,* 422 U.S. 86 (1975); *Silver* v. *New York Stock Exch.,* 373 U.S. 341 (1963); *Evans* v. *S.S. Kresge Co.,* 544 F.2d 1184 (3d Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); *United States* v. *Jerrold Elecs. Corp.,* 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961). *Cf. Mackey* v. *National Football League,* 543 F.2d 606 (8th Cir. 1976), *cert. dismissed pursuant to Rule 60,* 98 S. Ct. 28 (1977) (per se rule held inapplicable; practice held unlawful under rule of reason).

had to recognize that there had been no agreement on direct license prices, it incorrectly read the language in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), that agreements which "tamper" with price structures are per se unlawful, as meaning that the per se rule was the exclusive standard for evaluating price-affecting agreements.

Yet most agreements alleged to affect prices have ordinarily been evaluated under the rule of reason.[14] For example, when presented with joint delegation of pricing decisions to an agency controlled by a group of competitors, or with an express agreement among competitors as to the prices at which they would buy or sell during a given part of the business day, this Court has looked to the purpose, effect and industry context of such agreements, decided that they were *not* "price fixing" agreements, and upheld them under the rule of reason. *See Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 163 (1931); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918).[15]

14. *See, e.g., United States* v. *Container Corp. of America*, 393 U.S. 333 (1969); *Sugar Inst., Inc.* v. *United States*, 297 U.S. 553 (1936); *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925); *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925). *See also United States* v. *Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975).

Several recent lower court decisions have also refused to recognize a "constructive" price fixing offense such as the Second Circuit created below. *DuPont Glore Forgan Inc.* v. *American Tel. & Tel. Co.*, 437 F. Supp. 1104, 1126-29 (S.D.N.Y. 1977), *aff'd*, No. 77-6154 (2d Cir. March 17, 1978); *United States* v. *Nu-Phonics, Inc.*, 433 F. Supp. 1006, 1013 (E.D. Mich. 1977); *Cullum Elec. & Mechanical, Inc.* v. *Mechanical Contractors Ass'n*, 436 F. Supp. 418, 427-28 (D.S.C. 1976), *aff'd*, 569 F.2d 821 (4th Cir. 1978); *Arizona* v. *Cook Paint & Varnish Co.*, 391 F. Supp. 962, 965-67 (D.Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); *Jacobi* v. *Bache & Co.*, 377 F. Supp. 86, 95-96 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

In *Standard Oil Co. (Indiana)* v. *United States*, *supra*, the Court was confronted with agreements among licensors of interlocking patents on a price for a license to all of the patents and on a formula for division of the proceeds. The Court noted (283 U.S. at 168) that each patent owner

> "was to share in some fixed proportion the fees received under these multiple licenses. The royalties to be charged were definitely fixed in the first contract, and minimum sums per barrel, to be divided between the Texas and Indiana companies, were specified in the second and third."

Despite the obvious impact of these agreements on price, the threshold question whether such agreements should be judged by per se rules was answered in the negative. The Court stated that, "Such contracts must be scrutinized to ascertain whether the restraints imposed are regulations reasonable under the circumstances . . . ." *Id.* at 169. The Court then proceeded to find that the agreements did not violate the antitrust laws because each competitor retained the right to issue individual licenses. *Id.* at 170-71.

In view of these precedents, any case involving conduct alleged merely to *affect* prices requires a preliminary deter-

15. Several lower court cases have also held that not all price agreements or competitor sales through joint agents constitute price fixing. *Eastern Scientific Co.* v. *Wild Heerbrugg Instruments, Inc.*, [Current] 5 Trade Reg. Rep. (CCH) (1978-1 Trade Cases) ¶ 61,926 (1st Cir. March 17, 1978); *Evans* v. *S.S. Kresge Co.*, 544 F.2d 1184, 1190-93 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *International Mfg. Co.* v. *Landon, Inc.*, 336 F.2d 723, 729 (9th Cir. 1964), *cert. denied*, 379 U.S. 988 (1965); *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 166-68 (S.D.N.Y. 1960); *United States* v. *Morgan*, 118 F. Supp. 621, 688-91 (S.D.N.Y. 1953).

mination as to whether per se treatment is appropriate. Where the effect on price is not clear or where there are proper procompetitive purposes for the alleged restraint, a rule of reason analysis should be applied. Here, both of these factors were present and ignored by the court of appeals. Adopting an "overly simplistic"[16] approach, the court failed to make this threshold determination.

Committed by its erroneous reading of *Socony-Vacuum, supra,* to a course of applying a per se rule, the court ignored every signal indicating that per se analysis was inappropriate. Neither of the functions of a per se rule could be served here. The virtue of predictability was hardly protected by holding per se unlawful practices which were required by government consent decree and had been openly engaged in by thousands of writers and publishers for decades. The result could hardly have been more startling. Nor was predictability advanced by the enunciation of an "exception" to the per se rule in which the legality of the practice turns on the "market necessity" of the practice to the buyer (A.13a-16a), or by the ruling that a practice held per se illegal might in some circumstances be allowed to continue. (A.21a-23a.) Conservation of trial time was hardly a factor since the district court had already conducted an exhaustive rule of reason trial. *See Mackey* v. *National Football League,* 543 F.2d 606, 619-20 (8th Cir. 1976), *cert. dismissed pursuant to Rule 60,* 98 S. Ct. 28 (1977). To ignore the extensive record in favor of making a priori suppositions was pointless and dangerous.

Diverted from the extensive record by its per se approach, the Second Circuit made an erroneous assumption which was central to its conclusion that blanket licensing

16. Case Comment, 91 Harv. L. Rev. 488, 491 (1977).

necessarily has an anticompetitive effect on prices. The court assumed that

> "the very availability of the blanket license . . . must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete." (A.20a; emphasis in original.)

The record shows, however, and the district court found, that this proposition is utterly false because the individual writer or publisher has no power to choose the method by which the network will license the music it wants. The facts are that

> —selection of music is made by the user (A.56a-61a, 63a-64a, 67a-69a, 72a, 90a-93a, 103a, 108a, 112a),
>
> —there is a high degree of interchangeability among songs suitable for network television use (A.48a, 92a, 119a-120a), and
>
> —if a copyright owner will not license in the manner a television network user wants, his music will not be used. (A.89a-93a, 105a-106a, 108a, 112a, 119a-120a.)

So long as a user elects to employ blanket licenses, the copyright owner has no occasion to compete for direct sales to that user since the user does not want to buy two licenses for the same music. When a user chooses not to take a blanket license, however, the copyright owner has every incentive to compete for direct sales to that user.[17] (A.62a, 120a.)

17. Even Judge Moore, who voted to deny rehearing, recognized that the majority's "assumption" "that the blanket license 'reduces price competition among the members and provides a disinclination to compete'," is "unsupported by proof." (A.125a.)

The offering of blanket licenses creates a competitive alternative in the market place to which the user, not the copyright owner, can turn. Its effect on the prices that can be charged in direct licensing transactions is procompetitive. There was no rational basis on which the court of appeals could hold the offering of blanket licenses per se illegal.

III.

THE SECOND CIRCUIT HAS CREATED A WHOLLY INEQUITABLE DOCTRINE OF COPYRIGHT MISUSE.

Under the equitable doctrine of patent misuse, a patentee whose conduct extends the patent monopoly beyond the scope permitted by Congress or the Constitution cannot enforce his patent. *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488 (1942). The doctrine has been applied to deny enforcement in numerous cases where patentees have engaged in various anticompetitive practices and have not "purged" the misuse by abandoning the improper practice. This Court has never decided whether a comparable antitrust-related misuse doctrine should be applied to copyrights.

The Second Circuit's offhand footnote statement that the millions of copyrights in the ASCAP and BMI repertories had been "misused" [18] raises that question in the most compelling possible context. The livelihoods of composers and publishers depend upon the continued unimpaired enforceability of these copyrights. Yet the Second Circuit's opinion gives no indication that the court actually considered the consequences of its misuse finding or took into account

18. "We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim." (A.23a.)

the different policy considerations relating to patents and copyrights.[19]

Despite their similarity for some purposes, there is a vast difference between patents and copyrights in their potential for misuse. The grant of an important patent can have tremendous economic impact. A new industry can arise under the sole control of a statutory monopolist. Old methods of producing familiar products can be rendered uneconomical and obsolete by a single invention, and a patentee may be able to dictate the terms upon which previous enterprises will be allowed to continue to operate.

Even the most popular copyrighted song lacks anything like the economic clout of an important patent. Inability to perform a particular song would not exclude anyone from engaging in the music business at any level. Numerous important and popular works are in the public domain and constantly available. Other copyrighted compositions could readily be substituted. Indeed, users with talent would find

19. The lower courts have previously been presented with antitrust-related copyright misuse defenses in several cases. Most have rejected the defense. *See, e.g., Harms, Inc.* v. *Sansom House Enterprises*, 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd per curiam sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959); *Buck* v. *Cecere*, 45 F. Supp. 441 (W.D.N.Y. 1942). Others have upheld or been willing to entertain it. *See, e.g., M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed per curiam sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949). At least one court sought to apply a balancing test—a remedy less stringent than the *Morton Salt* test. *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). None of these courts attempted an in-depth analysis of policy requirements and the policy distinctions between copyright and patent problems. *See generally* Gibbs, "Copyright Misuse: Thirty Years Waiting for the Other Shoe," 23 ASCAP Copyright L. Symp. 31 (1977); Fine, "Misuse and Antitrust Defenses to Copyright Infringement Actions," 17 Hastings L.J. 315 (1965); Note, "The Misuse Defense in Copyright Actions," 37 N.Y.U. L. Rev. 916 (1962); Nicoson, "Misuse of the Misuse Doctrine in Infringement Suits," 9 U.C.L.A. L. Rev. 76 (1962).

it simple enough to "invent around" a song and replace it with an original work. Quite unlike the patent field, artists could not be excluded from practicing any "method" or "process" from which, for example, all "rock" songs or all "folk" songs derive.

Thus, even if "abused," the copyright monopoly would have little potential for creating wide-ranging adverse economic effects, and there was no reason to suppose that this Court would approve the application of identical misuse doctrines in patent and copyright cases.

Nor would it be equitable to apply such a misuse doctrine in the present case in light of what these composers and publishers have actually done.[20] While remaining able and willing to grant direct licenses themselves, they have simply licensed BMI and ASCAP to license others to perform their compositions. They have used the historically accepted manner of selling music performance rights through licensing organizations. They have dealt with organizations whose offering of blanket licenses has long been recognized and even required by government consent decree.

Even if these acts could be held to have violated the antitrust laws, this would be one case where the remedies available under those laws should be exclusive. Any misuse doctrine surely should retain enough of the equitable nature of its origin not to allow a court to apply it on these facts.

---

20. Indeed, a holding of misuse in the present case would be most inequitable because copyright owners have so little guidance as to how the "misuse" could be purged. At oral argument CBS' counsel stated,

> "Now, it is also true that in this per use system that price negotiated between ASCAP and CBS would be a price which would influence the price of direct licensing transactions between program producers and publishers." (Tr. at 25.)

Since the per use license required by the Second Circuit must itself be price fixing if the Second Circuit's analysis of blanket licensing be accepted, there would be grave risks in attempting a unilateral determination of what conduct would actually constitute purging.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

May 5, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 24, Docket 75-7600.

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

(Argued October 14, 1976; Decided August 8, 1977.)

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Before MOORE, ANDERSON and GURFEIN, *Circuit Judges.*

Appendix A

GURFEIN, *Circuit Judge*:

The subject-matter of this appeal has been painstakingly set forth with clarity in the opinion of the District Court (Honorable Morris E. Lasker, Judge), 400 F.Supp. 737 (S.D.N.Y. 1975), and we refrain from restating the details of the evidence adduced at trial. We refer to that opinion for the evidence supporting the findings.

Columbia Broadcasting System, Inc. ("CBS") is a national television network, of which there are two others, National Broadcasting Company ("NBC") and American Broadcasting Company ("ABC"). CBS has brought this antitrust action against the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and their members and affiliates.[1] These members and affiliates are writers and publishers of musical compositions.[2] ASCAP and BMI license the non-dramatic performance rights in their compositions.[3]

1. The references hereafter to ASCAP or appellant shall be taken to include BMI, unless the context clearly indicates otherwise. CBS was one of the founders of BMI in 1939. It gave up its stock interest in BMI in 1959, as have the other two networks. BMI in [*sic*] still owned by individual broadcasters. CBS is the parent of CTN, the Columbia Television Network.

2. "Writers" is a generic term which describes both those who supply the music, the composers, and those who supply the lyrics, the authors. *See Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322, 326 n.5 (S.D.N.Y. 1959).

3. These non-dramatic rights are called the "small" rights of musical compositions as opposed to the "grand" or dramatic rights. For a discussion of the distinction between these terms, *see 2 Nimmer on Copyright* §125.6 (1976). For our purposes it is enough to note that while ASCAP could normally license the performance of a song from, for example, *My Fair Lady*, it could not license the

(footnote continued on next page)

Appendix A

ASCAP and BMI issue blanket licenses for the right to perform any or all of the compositions in their repertories over the CBS network in exchange for a *negotiated* fixed annual fee. CBS contends that this method of licensing violates §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and constitutes copyright misuse.[4] CBS sought an injunction under §16 of the Clayton Act, 15 U.S.C. §26, directing ASCAP and BMI to offer CBS performing rights licenses on terms which reflect the actual use of music by CBS, or, alternatively, enjoining them from offering blanket licenses to any television network. CBS also sought a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202. The District Court, after a trial without a jury on liability alone, dismissed the complaint, and CBS appeals.

In dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*. Analogy may be sought in each field, but the practical complexities of licensing musical

song in the context of a performance in whole or part of the play itself. Apparently, most uses of a musical composition by broadcasters, nightclubs and restaurants would be considered non-dramatic and therefore subject to license by ASCAP. Throughout this opinion references to "performing rights" refer only to performing rights for profit in non-dramatic performances.

4. Sections 1 and 2 of the Sherman Act state in relevant part:

> "§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .
>
> "§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

non-dramatic performing rights can find no precise analogy anywhere. In the case of ordinary products, persons who use them without paying for them are generally thieves. In the case of infringement of performing rights in musical compositions, the infringement can be wholly innocent or due to the pressure and difficulty of obtaining timely clearance by individual license. This infringement aspect, unknown elsewhere, except to some extent in the field of patents, makes the music industry *sui generis*.

I

A summary history of ASCAP's difficulties with the antitrust laws will enable us to focus on the limited but difficult questions presented on this appeal.

In 1934 the Department of Justice filed suit against ASCAP seeking its dissolution and charging, *inter alia*, that through its pooling of individual copyrights ASCAP had the power to, and did, dominate the radio broadcasting industry.[5] However, after two weeks of trial, the Government received a continuance and the case remained dormant thereafter.

In 1941 the Government sued ASCAP and BMI as unlawful combinations on the principal ground that the annual blanket license (which was the *only* license then offered by ASCAP and BMI) was in restraint of trade. The complaint also charged that arbitrary prices were being ob-

5. *United States* v. *ASCAP*, Equity No. 78-388 (S.D.N.Y., filed Aug. 30, 1934). *See* Note, "Musical Monopolies and Legislative Control," 53 Harv. L. Rev. 458, 459 (1940); Note, "Anti-ASCAP Legislation and Its Judicial Interpretation, 9 Geo. Wash. L. Rev. 713, 720 (1941).

tained for the blanket licenses by the illegal pooling of copyrights. The Government sought an order enjoining, *inter alia*, ASCAP's *exclusive* licensing and requiring a form of *per use* licensing.

A consent decree resulted in 1941 by the terms of which ASCAP could no longer assert the *exclusive* right to license performing rights and could no longer interfere with *individual* licensing by its members. But the latter provision was itself illusory, because if the member licensed performing rights in his own copyright, he nevertheless had to pay the royalties derived therefrom into the ASCAP pot, thus affording little incentive for licensing by the individual member.[6]

Soon after the 1941 consent decree, ASCAP was sued by two hundred motion picture theatre owners for violation of Sections 1 and 2 of the Sherman Act. The problem was special to the theatre exhibition industry which was required at that time to take an ASCAP blanket performance license in order to exhibit motion pictures, the synchronized music of which had *already* been licensed to the motion picture producer. The specific holding by Judge Leibell in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F.Supp. 888 (S.D.N.Y. 1948), was that it was unlawful for ASCAP to require the motion picture producer to contract with distributors that the film would be shown only in theatres having an ASCAP *performance* license. In broader terms, the decision held that ASCAP was a combination in restraint of trade be-

6. *See* Section 11 (I) of the 1941 Decree, *United States* v. *ASCAP*, 1940-43 CCH Trade Cases ¶56,104 at 403 (S.D.N.Y. 1941); Timberg, "The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950," 19 Law & Contemp. Prob. 294, 320 (1954).

cause the members had transferred all their non-dramatic performing rights to ASCAP and were barred from individually assigning such rights to motion picture producers. 80 F.Supp. at 894. *See also M. Witmark & Sons* v. *Jensen,* 80 F.Supp. 843, 849 (D.Minn.1948).[7]

At about this time, the Government began to renegotiate the consent decree with ASCAP. The amended consent decree reflected two important changes. First, ASCAP, unlike its position under the 1941 decree, was no longer permitted to interfere with the right of any of its members to issue a direct license to a user. The royalty so obtained did not have to go into the ASCAP pot for later distribution on some formula basis. Second, although ASCAP was still not required to issue per use licenses for broadcasters, it was required to issue per program licenses and not to discriminate against their free selection by licensees.[8]

The per program license is simply another form of blanket license. Both it and the "annual" blanket license permit use of any composition in the ASCAP inventory, and both permit payment by a fixed percentage of advertising revenues or a "flat" fee. The difference is that under the annual blanket license, the payment remains the same for the year regardless of whether all or none of the network's programs use ASCAP compositions, while under the per program license the fee is determined by the number of programs using ASCAP compositions. However, neither permits the licensee to pay only for those compositions which it actually uses, and the per program license should not be confused with a per use license.[9]

7. The *Alden-Rochelle* decision, *supra,* dealt only with performing rights in motion picture theatres.

8. *See United States* v. *ASCAP,* 1950-51 CCH Trade Cases ¶62,595 at 63,753-754 (S.D.N.Y. 1950).

In strengthening the per program alternative, the amended decree prohibits ASCAP from requiring or influencing the licensee to negotiate for an annual blanket license before negotiating for a per program blanket license, and prohibits discrimination against its use by price differentials. If the licensee and ASCAP cannot agree upon a fee, the matter is left to the District Court to determine a "reasonable fee." And a prospective licensee is theoretically free to negotiate for non-exclusive performance rights with any ASCAP member, without interference by ASCAP. But ASCAP is presently not free to negotiate for licenses for the performance of particular music without the specific consent of the ASCAP member.

Though CBS acquiesced in this arrangement for many years, it decided, some years ago, that it was being denied the right to pay only for the music it uses. It could not, by itself, attempt to amend the decree. Instead, it brought this action, as it was entitled to do.[10] In the meantime,

9. Under the per program license, once there is any use, the amount of use is irrelevant. It does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same.

The utility of the per program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming. In any case, we understand that all three networks and virtually all commercial television stations in the United States hold "annual" blanket licenses.

Under a per use license, on the contrary, the user would pay only for those compositions actually used during the program.

10. *See Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 689-90, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961); *United States* v. *ASCAP (Shenandoah Valley Broadcasting, Inc.),* 331 F.2d 117, 124 (2d Cir.), *cert. denied,* 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed.2d 1048 (1964).

NBC and ABC, while they may have other grievances, have not joined in this attack on blanket licensing to the networks.[11]

II

CBS contends that the blanket licensing method is not only an illegal tie-in or block-booking which in practical terms is coercive in effect, but is also an illegal price-fixing device, a per se violation of Sherman Act §1 in restraint of trade.

Judge Lasker, treating the case essentially as a tie-in or block-booking case which required proof of coercion to establish illegality, held that the provision of the consent decree allowing direct licensing for use by the individual copyright owners saved the scheme from being coercive and, hence, illegal. He found that the right of CBS to negotiate with individual copyright owners was not impractical, even if the blanket licensing system were not enjoined, but rather that the evidence indicated that if CBS chose to do so, it could obtain the performing rights it needed for use in a direct negotiation market without having to take a blanket license from ASCAP.[12] On that

11. We note, however, that both ABC and NBC have specifically retained the right to transfer to a per use license from a blanket license, but only in the event that CBS receives a per use license from ASCAP.

12. Judge Lasker had the benefit of the expert testimony of three distinguished economists, Franklin M. Fisher for CBS, Robert Nathan for ASCAP and Peter O. Steiner for BMI. The experts disagreed sharply on the likely future action of a direct negotiation market. Judge Lasker essentially accepted the Nathan view. He found that the market forces would tend to create a licensing

(footnote continued on next page)

basis, as well as on his conclusion that there was no unlawful price-fixing, he dismissed the complaint.

Without commenting in detail on the evidence contained in the twenty-four volumes of the Appendix, we note that there was conflicting testimony by witnesses from the music industry and by expert economists on each side. We recognize that not all network needs for music would encounter the same difficulty in procurement. Thus, theme or background music is often original music created by a composer on a salary basis for a packager of the program or for the network. In such case, individual negotiation for the performing rights would not be difficult. Where the theme or background music has already been published, the name of the publisher is easily available. In the case of "feature" performances on variety shows, the obtaining of performance rights does involve some uncertainty. Situations may indeed arise where the writer's consent is required and would be hard to get. However, even in this area CBS could require the outside packager or producer to obtain the performance rights when he obtains the synchronization rights.[13]

agency similar to the Harry Fox Agency which handles synchronization rights. There was testimony that it would take probably six months to a year after CBS' announcement of its intention to go to direct licensing for a viable market to emerge and that, in the meantime, there would be some disinclination to deal with CBS with some attendant confusion. Mr. Nathan frankly conceded, however, that there is no actual evidence of the characteristics of a direct negotiation market in these circumstances, for it has never been tried.

13. The writer generally assigns the right to license performing rights to the music publishers. Under the American Guild of Authors and Composers form contract, publishers are required to obtain an AGAC writer's consent for television synchronization

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Appendix A

The conflicting predictions at the trial obviously involved psychological as well as economic factors, and the economic theory presented was an amalgam of the two. Prophesying the future is one of the less satisfactory tools of the judicial process. Suffice it to say that our review leads us to the conclusion that the essential finding of the District Court that such a market can exist is not clearly erroneous.[14]

licenses for songs over ten years old, and motion picture synchronization licenses for vocal use of a composition. The District Court, based on the testimony, found that "[t]here is every reason to believe that most writers would either give their publishers blanket consent for performance licenses, or give it promptly on a use-by-use basis, just as they presently do regarding synch rights." 400 F.Supp. at 761. The upshot is that, as a practical matter, the networks would generally deal with publishers or through brokers or agencies of the publishers, rather than composers. *See* 400 F.Supp. 760-62.

14. CBS also calls attention to one historical situation and to one current situation in support of its thesis that a direct negotiation market will not work. It contends that when Minnesota Mining and Manufacturing Company tried to negotiate individual licenses for performing rights on an experimental background music project, it allegedly met with frustration. The District Court found, however, that CBS' allegations concerning that situation were overstated and, in any case, did not support CBS' contentions here, 400 F.Supp. at 771-75. Its finding is not clearly erroneous.

CBS also raises a subsidiary problem dealing with "music in the can." Each network now has a large inventory of recorded programs and motion picture films containing music for which it has synchronization rights but no performing rights other than those afforded by the ASCAP blanket license. CBS contends that since it lacks performing rights the copyright proprietor would have an enormous leverage to exact a premium, because, in the absence of a blanket license, appellant could not telecast the motion picture without the music owner's consent. There is a good deal of speculation in the record on what would happen to the amount of royalty for "music in the can" in various hypothetical situations, including testimony that CBS is so powerful a buyer that publishers could not afford to get into its bad graces. This is a question of fact and the

(footnote continued on next page)

Appendix A

While this finding of the District Court that there is indeed a viable alternative to the blanket license disposes of the charge that the blanket license involves an illegal tie-in or block-booking, *see, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); 17 U.Chi.L.Rev. 183 (1949); Timberg, *supra* note 6 at 300, it does not resolve the charge of restraint of trade by the fixing of prices.

The charge that there is a restraint of trade by price-fixing is founded upon the conception that when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition. But even if the single price is *reasonable*, the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition.[15] His dis-

District Court found that "CBS has not proven that its fears of a 'holdup' by copyright proprietors are justified." 400 F.Supp. at 776. In any event, it is hard to see how "music in the can" problems will be solved by an injunction against blanket licensing. The individual licenses would still have to be negotiated with some of the same economic problems involved.

15. ASCAP distributes about $1,000 ($400-$500 to the publisher or publishers; $400-$500 to the writer or writers) for each television network feature performance of an ASCAP composition (and correspondingly lower amounts for theme and background uses). The royalty is fixed by ASCAP and not by the licensee.

Paragraph XI of the 1950 amended decree requires ASCAP to distribute royalties on "a basis which gives primary consideration to

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tributive share of the common royalties may be greater than the royalty he would receive in a free market. In such case, even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a "combination which tampers with price structures [and therefore] engage[s] in an unlawful activity." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940).[16]

There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his own particular composition, and Judge Lasker found that musical compositions, though not fungible, do fall into classes, so that one composition in a particular class may serve the network as well as another in the same class. 400 F.Supp. at 751-52. There is, moreover, some analogy to the patent pooling cases which broadly hold that the pooling of competing, and perhaps even non-competing, patents is illegal. *See United States* v. *New Wrinkle, Inc.*, 342 U.S. 371, 72 S.Ct. 350, 96 L.Ed. 417 (1952); *United States* v. *Line Mate-*

the performance of the compositions . . .." Under the 1960 amendment, writers also have the option of receiving royalties under a plan which compensates them additionally for length of membership and the recognized status of their works. *See* 1960 Consent Decree, Section III(A) and Part I of Attachment A, *United States* v. *ASCAP*, 1960 CCH Trade Cases ¶69,612 at 76,469-470 (S.D.N.Y. 1960).

16. And, of course, it has long been held that the fact that "the object of sale is the creation or product of a man's ingenuity does not alter this principle." *Associated Press* v. *United States*, 326 U.S. 1, 15, 65 S.Ct. 1416, 1422, 89 L.Ed. 2013 (1945). *See Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

rial Co., 333 U.S. 287, 68 S.Ct. 550, 92 L.Ed. 701 (1948).[17] While these cases involved resale price-maintenance agreements, the broad language of the opinions treated the patent pooling agreement as itself unlawful.[18]

Price-fixing, as we have been instructed, is generally unlawful per se. *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 221, 223, 60 S.Ct. 811; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). Yet it may be that in some circumstances market requirements would require the acceptance of some form of price-fixing. In fact, both the plaintiff here, CBS, and the Department of Justice, which is charged with enforcing the Sherman Act, recognize in the case of ASCAP blanket licenses what CBS has termed the "Per Se Rule with a Market-Functioning Exception." In short this concept holds that price-fixing is per se illegal except where it is absolutely necessary for the market to function at all.

The question was addressed by the Government in the case of *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968). That was an action for copyright infringement brought by several ASCAP members against a radio broadcaster operating in the state of Washington. The broadcaster defended in part on the assertion that ASCAP's price-fixing as well as its commission of other

17. Hence, on the surface, the pool of copyrights may be analogized to a pool of competing patents.

18. *See United States* v. *New Wrinkle, Inc.*, 342 U.S. 371, 377, 380, 72 S.Ct. 350, 96 L.Ed. 417 (1952); *United States* v. *Line Material Co.*, 333 U.S. 287, 308, 68 S.Ct. 550, 561, 92 L.Ed. 701 (1948) (illegal "whether it is a price agreement between *producers for sale* or between producer and distributor for resale") (emphasis added).

antitrust violations constituted copyright misuse. It also counterclaimed for treble damages and injunctive relief. The District Court held that the copyrights were infringed and that the defense and counterclaims were insufficient. The Ninth Circuit, in affirming, rejected the antitrust defense.

In *K-91* the parties recognized that there was a market need for blanket licensing for the single radio station there involved; indeed, they had stipulated that "[i]t would be commercially, practicably and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations."[19]

On the petition for certiorari in an amicus brief, the Solicitor General, in approving the result reached by the Ninth Circuit, stated:

> "The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *United States* v. *St. Louis Terminal*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933); *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918). This case appears to

19. The stipulation is quoted in Judge Lasker's opinion below on ASCAP's motion for summary judgment. *Columbia Broadcasting System, Inc.* v. *ASCAP*, 337 F.Supp. 394, 400 (S.D.N.Y. 1972).

> us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.
>
> "If this market is to function at all, there must be —at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them."[20]

The Solicitor General recognized that for some broadcasters direct licensing might be possible and more desirable, and that technological changes, such as in computer technology, might eliminate the need for the blanket license. He found, however, that market necessity may justify "bulk licensing of recorded music" where no "practical alternatives exist"[21] and concluded that on the record in that radio-broadcasting case the ASCAP blanket license to the radio station did not violate the antitrust laws.

This "market necessity" concept, as a very limited and narrow exception to the per se rule against price-fixing, is not without merit. It would seem reasonable to conclude that Section 1 of the Sherman Act, which prohibits combinations in restraint of trade, should be construed so as not

20. Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari in the Supreme Court of the United States, *K-91, Inc.* v. *Gershwin Publishing Corp.*, No. 147, dated December, 1967 at 10-11 ("Amicus Brief").

21. *Id.* at 13.

to prohibit the very trade it was intended to protect.[22] We do not quarrel, therefore, with the *result* reached by the Ninth Circuit in *K-91*.

In this case, by contrast, Judge Lasker found that, with respect to the television networks, a "practical alternative" —the free direct negotiation market—can exist *even beside* the blanket license. It would seem to follow *a fortiori* that the direct negotiating market can surely exist if the blanket license is eliminated.

The dilemma here is that if the blanket licensing system is viewed as block-booking, the *availability* of a direct negotiating market does save it from being "coercive." On the other hand, if the blanket licensing system is held to be price-fixing in restraint of trade, the very availability of a direct negotiating market would tend to make the blanket license less of a "market necessity." Curiously, though appellant now focuses its principal attack on the blanket license as a price-fixing device, it was appellant which throughout the trial tendered proof upon proof that a direct negotiating market posed *severe* practical problems. If that is true, such proof tends to demonstrate a *need* for the availability of an alternative blanket license. On the other hand, it was ASCAP which attempted to prove that a direct negotiating market can be made to exist even in competition with the blanket license. This raises the question, paradoxically, whether if that be true, the blanket license can nonetheless continue to be regarded as a market *necessity*. Thus, if we pose the issue as tie-in or block-booking, the

22. The narrowness of the exception is emphasized by the circumstance that it is difficult even to imagine another industry where such a "market necessity" defense would be applicable.

absence of coercion supports the view of the District Court if we accept its finding that a direct negotiating market is feasible. On the other hand, if we pose the issue as restraint of trade through price-fixing, the very finding that a direct negotiating market is feasible tends to undermine the need for the blanket license as a market *necessity*.

Several arguments have been advanced to refute the contention that the blanket license is itself a price-fixing mechanism in restraint of trade. The District Court met the price-fixing argument by suggesting that price-fixing has been sustained in patent cases in the absence of coercion. It cited *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), and *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950), for the proposition that "the critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor." 400 F.Supp. at 749. The *Hazeltine* cases did not involve a restraint of trade by price-fixing, however, for these were cases in which a single trader, Hazeltine, owned and licensed all the patents involved. Coercion is simply not an essential ingredient of price-fixing. *Cf. United States* v. *Socony-Vacuum Oil Co., supra*, 310 U.S. at 225 n.59, 60 S.Ct. 811.

Another price-fixing defense asserted by ASCAP and accepted by the Ninth Circuit in *K-91* is that the consent decree insulated ASCAP against the restraint of trade charge on the ground that the price of the blanket license was "reasonable," since resort to the District Court was available to determine "reasonableness." That a price fixed by the agreement of competitors is "reasonable" is

not a defense, however.[23] Nor do we think that the determination of the "reasonableness" of the price by a *court* saves the price that has been fixed by a combination from continuing to be an unlawful device in restraint of trade, absent the justification of market necessity. In the *K-91* situation, the resort to judicial supervision was adequate for the simple reason that there was no other solution possible. The provision in the consent decree for resort to the District Court if there is a dispute on the reasonableness of the blanket license fee was highly desirable in the *K-91* situation, because there it represented a threatening veto to gross overreaching. On the other hand, when a competitive market *is* available, as the District Court found to be the case here, the determination of price by a judge can hardly be the equivalent of a price determined by a competitive market. For a price fixed by a judge, no matter what his personal competence, is not a true reflection of competitive market forces. The price, no matter how reasonable, if determined on the imprimatur of a court, remains the product of non-competitive forces.

Nor is ASCAP "disinfected" by the Government consent decree, see *K-91, supra* at 4; such a decree does not "constitut[e] an implied partial repeal of the antitrust

23. *Cf. United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396-97, 47 S.Ct. 377, 71 L.Ed. 700 (1927). We also note that the costs of litigating the issue of what is a "reasonable" fee in the Southern District of New York would discourage some users from taking advantage of this provision in the decree. In fact, in the 27-year existence of the provision, the consent-decree judge has never had to fix a "reasonable" fee for an ASCAP blanket license.

Finally, we note that this defense would not be available to BMI because its consent decree has no provision providing recourse to the District Court to determine a "reasonable" fee in cases of disagreement between the parties.

laws." 337 F.Supp. at 399-400. A consent decree has no such potency. Non-parties who did not participate in the settlement, and who are affected by ASCAP's activities may challenge them under the antitrust laws. *See Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689-90, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961); *United States* v. *ASCAP* (*Shenandoah Valley Broadcasting, Inc.*), 331 F.2d 117, 124 (2d Cir.), *cert. denied*, 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed. 2d 1048 (1964).

As the Supreme Court has noted, subsequent to the *K-91* decision, a consent decree, as it affects the parties themselves, is simply a compromise based on many factors. *United States* v. *Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971). In historical fact, the government lawyer who negotiated the 1950 decree has stated that the "District Judge who entered the judgment, in conformity with the prevailing practice, gave no indication as to the legality or illegality of ASCAP's past organization or contemplated reorganization, or of its old or new practices." *Timberg, supra* note 6, at 295 n.2. And more recently, as the Solicitor General noted in his amicus brief in *K-91*: "[p]rivate parties, of course, always have the option of seeking relief in their own behalf, notwithstanding any consent decree accepted by the government."[24] The Government consent decree does not insulate ASCAP from the claims of private plaintiffs.[25]

24. *See* Amicus Brief, *supra* note 20 at 14.

25. We do not imply that a government consent decree should be given no weight at all, especially since the Department of Justice has the responsibility for enforcing the Sherman Act. But it is not even clear that the problems presented in this action are coeval with those which surfaced almost 30 years ago when this decree was negotiated. We have had a more recent indication of the government's views, moreover, in its amicus brief in *K-91*.

Finally, ASCAP argues, as its basic premise, that the blanket license of the performance rights in *all* the copyrights in the Society's basket is so different from the performing right in each separate copyright that the claim of trade restraint by price-fixing is precluded. It urges that the collective activity necessary for the blanket license does not amount to price-fixing of the individual performing rights since the network can still bargain for such individual performing rights with each copyright owner separately. The argument that if one does not want the blanket license he need not take it is plausible. Yet the very availability of the blanket license itself involves the fixing of a collective price, which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete. "[T]he fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act." *See Associated Press* v. *United States*, 326 U.S. 1, 17, 65 S.Ct. 1416, 1423, 89 L.Ed. 2013 (1945).

ASCAP analogizes a blanket license to a symphony orchestra, in which the ensemble is different from the individual musicians and which may therefore lawfully command a price which is different and higher than the price for each musician's performance. The fallacy is that when the orchestra plays as an ensemble it represents the only product of its kind. Here each composer, by contrast, records his own solo for separate broadcast. The musicians in an orchestra are not competitors; the contributors of copyrights for the blanket license in many situations are, and it is their price competition among themselves that is affected by the blanket license.

We therefore conclude that the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a "market necessity" defense. It therefore constitutes a violation of §1 of the Sherman Act. We accordingly reverse the District Court's dismissal of the complaint.[26]

III

The trial below was on liability alone, and in view of the dismissal of the complaint no separate evidence was taken on remedy. In reversing the dismissal of the complaint we do not fashion the remedy. We think it useful, however, to offer some guidelines to the District Court in its selection of remedies.

Normally, after a finding of price-fixing, the remedy is an injunction against the price-fixing—in this case, the blanket license. We think, however, that if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited in all

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26. In not reaching the same result as the Ninth Circuit did in *K-91*, we, in no way, intimate that we would have held the blanket license to the single radio station to be unlawful, or that the blanket licenses given by ASCAP generally are unlawful. The *K-91* result was, in our view, entirely justifiable as an example of market necessity. Indeed, CBS concedes that market necessity would probably justify ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations.

circumstances.[27] The blanket license is not simply a "naked restraint" ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others.

Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing.[28]

27. We recognize that CBS contends that a blanket licensing system overhanging the market in any combination of circumstances will necessarily affect the price for each set of individual performing rights. On this record we are not convinced that this is necessarily so. And the District Court found the contrary.

CBS has asserted that an individual member of ASCAP, thrown into a direct negotiating market for the first time, will tend to measure the royalty he asks for a particular performing right by the royalty he has actually been receiving from ASCAP as his share under the blanket license. Considering the counterforce of the strong bargaining power of CBS, we cannot accept this as more than a theoretical assumption. Until some alternative method has actually been allowed to function for some time, contemporaneously with the blanket license, no man can say for certain that CBS' fears will prove inevitably to be true.

28. On remand, we think it would be appropriate for the District Court to invite the Department of Justice to participate or express its view on the appropriate remedy.

We also emphasize that in the foregoing discussion of remedy, "ASCAP" also includes appellant BMI. *See* note 1, *supra*.

We reverse the judgment dismissing the complaint and remand to the District Court for further proceedings in accordance herewith.[29] If the District Court considers it appropriate, it may fashion interim relief as well. No costs.

MOORE, *Circuit Judge* (concurring):

I concur in the majority's conclusion to remand for further proceedings so that such proof and argument as may be required, may be presented as will enable the court, and hopefully the parties as well, to evolve a practical method of adding to ASCAP's repertory per use licensing. Since future proceedings will be directed to that issue, my points of disagreement will not even rise to the status of that legal vacuity known as "dicta". However, I do not agree that "the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a 'market necessity' defense."

Market necessity is recognized by the majority as "not without merit" and certainly *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968), and the Solicitor General's accompanying amicus brief would support this view.

29. As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and "bypass" of the ASCAP blanket license. The District Court, as noted, rejected this contention and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record.

We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim.

Appendix B

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 69 Civ. 5740.

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS *et al.*,

Defendants.

(Filed September 22, 1975.)

LASKER, *District Judge.*

In this age of change the quality of life has been fundamentally altered and influenced by the development of the automobile, the computer and television.

Millions of viewers spend untold hours weekly viewing television. During the larger part of that time the viewer is a listener to programs which utilize music, whether as background, as theme or as a feature. This case relates to the method by which networks are licensed to use copyrighted music on television.

The Columbia Broadcasting System (CBS)[1] brings this antitrust action against the American Society of Compos-

1. CBS is engaged in a number of businesses, only one of which is the operation of the CBS television network (CTN). Although the parties distinguish between CBS and CTN in their post-trial submissions, for the sake of clarity we refer throughout this opinion to both the parent corporation and the network as "CBS."

ers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI)and their members and affiliates.[2] It complains that the present system by which ASCAP and BMI issue blanket licenses for the right to perform any or all of the compositions in their repertories over the CBS network in exchange for a flat annual fee violates the Sherman Act, 15 U.S.C. §§1 and 2. The complaint seeks an injunction under §16 of the Clayton Act, 15 U.S.C. §26, directing ASCAP and BMI to offer CBS performance right licenses on terms which reflect the nature and amount of CBS' actual use of music, or in the alternative, enjoining them from offering blanket licenses to any television network. CBS also seeks a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202.

I.

Introduction

A. The Parties

Prior to ASCAP's formation in 1914 there was no effective method by which composers and publishers of music could secure payment for the performance for profit of their copyrighted works. The users of music, such as theaters, dance halls and bars, were so numerous and widespread, and each performance so fleeting an occurrence, that no individual copyright owner could negotiate licenses with users of his music, or detect unauthorized uses. On

2. The other named defendants are certain members of ASCAP, as representative of the class of ASCAP's members; and certain BMI affiliates, as representative of the class of BMI affiliates. The case has heretofore been declared a class action against both classes.

the other side of the coin, those who wished to perform compositions without infringing the copyright were, as a practical matter, unable to obtain licenses from the owners of the works they wished to perform. ASCAP was organized as a "clearing-house" for copyright owners and users to solve these problems. The world of music has changed radically since 1914. Radio and television broadcasters are the largest users of music today; they "perform" copyrighted music before audiences of millions. In 1975 ASCAP and BMI licensed these large users, including CBS and the other networks as well as smaller ones such as concert halls and background music services.

Because of the multitude of performances of music they generate each year, virtually all radio stations and television networks secure the rights to perform the music they use by a "blanket" license. An ASCAP blanket license gives the user the right to perform all of the compositions owned by its members as often as the user desires for a stated term, usually a year. Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is "automatically" covered by the blanket license.

ASCAP's current membership includes some 6,000 music publishing companies and 16,000 composers. Its members have granted ASCAP, as their licensing agent, the non-

exclusive right to license users to perform the compositions owned by them. ASCAP provides its members with a wide range of services. It maintains a surveillance system of radio and television broadcasts to detect unlicensed uses, institutes infringement actions, collects revenues from licensees and distributes royalties to copyright owners in accordance with a schedule which reflects the nature and amount of the use of their music and other factors.

BMI, a non-profit corporation, was organized in 1939 by members of the radio broadcasting industry, including CBS. It is affiliated with approximately 10,000 publishing companies and 20,000 writers and functions in essentially the same manner as ASCAP. Although CBS sold back its BMI stock to the corporation in 1959, BMI is still owned entirely by broadcasters.

As a practical matter virtually every domestic copyrighted composition is in the repertory of either ASCAP, which has over three million compositions in its pool, or BMI, which has over one million. Like ASCAP, BMI offers blanket licenses to broadcasters for unlimited use of the music owned by its "affiliates." Almost all broadcasters hold blanket licenses from both ASCAP and BMI.

As is generally known, CBS operates one of three national television networks, as well as AM and FM radio stations in seven major cities. It has held blanket licenses from ASCAP for its radio broadcast operations since 1928, and from BMI since soon after that organization was founded in 1939. It has held ASCAP and BMI blanket licenses for its television network on a continuous basis since the late 1940's.

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CBS supplies television programs to approximately two hundred affiliated television stations throughout the country, and telecasts about 7,500 programs per year. Many of these programs make use of copyrighted music which is recorded on the soundtrack. However, CBS does not produce most of the programs seen on its network. Instead it purchases the right to broadcast programs produced by independent television production companies, known as "program packagers." Most of the popular prime-time serials fall into this category. In addition CBS itself produces a television serial ("Gunsmoke"), two day-time serials, a number of "specials," usually variety shows, as well as news, public affairs and sports programs.

Agreements between program packagers and CBS normally stipulate the price at which the packager will produce a program in a series and furnish it to CBS for broadcast. Pursuant to the agreements, packagers are responsible for obtaining and furnishing to CBS most rights necessary for the use of copyrighted music by the network, such as the right to record a copyrighted song in synchronization with the film or video tape ("synch" rights). However, program packagers do not, in the present scheme of things, furnish to CBS the right to *perform* the copyrighted music for profit as part of a television broadcast. Ever since television became commercially practicable in the late 1940's, CBS has obtained such "performance" rights for packaged programs, as well as for the programs it produces itself, from ASCAP and BMI by purchasing blanket licenses. From time to time it has renewed its licenses after negotiations with ASCAP and BMI. In the history of the parties the fee for the blanket license has been ex-

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pressed in terms of a percentage of CBS' advertising revenues. For example, for many years prior to the institution of suit, the BMI blanket license fee remained at 1.09% of net receipts from sponsors after certain deductions. This resulted in payment to BMI of about $1.6 million in 1969. For access to ASCAP's considerably larger repertory, CBS paid about $5.7 million in 1969. Averaging the total of $7.3 million paid by CBS in that year over 7,500 programs, its cost for ASCAP or BMI music runs about $1,000. per program. Of course, as detailed later, many of CBS' programs, such as news and public affairs shows, use no music at all; while others, such as variety shows, use a great deal. $1,000. is a small fraction of the total cost of the program. CBS pays about $200,000. for each episode of a one hour variety show or dramatic serial, and as much as $750,000. for a made-for-TV movie. Since the commencement of this action, CBS has held interim blanket licenses from ASCAP and BMI at a total annual cost of some $6 million.

B. The Consent Decrees

Neither ASCAP nor BMI is a stranger to antitrust litigation. In 1941 the government sued ASCAP for antitrust violations. The action resulted in a consent decree which largely governs ASCAP's relationships with licensees such as CBS and other users. As amended in 1950, the decree requires ASCAP to offer a "per program" license to broadcasters in addition to the blanket license it has traditionally offered. Both forms of license grant the right to use any or all of the works in ASCAP's repertory. However, the blanket license allows use of the entire in-

ventory for a designated period of time, usually a year, for which the user pays a flat fee, while the per program license permits use of the entire repertory but requires payment only with respect to programs which actually make use of copyrighted music. The 1950 decree mandatorily enjoins ASCAP to set its fees for these licenses in a manner which gives the user a genuine choice between them, and prohibits it from requiring or influencing the prospective licensee to negotiate for a blanket license before negotiating for a per program license.[3] If ASCAP and the licensee

3. The 1950 decree states in part that ASCAP is:

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs,

(footnote continued on next page)

are unable to agree on a fee, the latter may apply to the United States District Court for the Southern District of New York for determination of a "reasonable fee." In such proceedings, ASCAP bears the burden of establishing the reasonableness of the fee it requests.

Finally, ASCAP's licensing authority is not exclusive. The 1950 decree provides that music users may bypass

with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Sub-section (B) hereof, and to the final order or judgment entered by this Court in such proceeding . . .

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ASCAP entirely, and negotiate for a license directly with the composer or publisher holding the copyright.[4]

Under the terms of a consent decree entered in 1966 in *United States* v. *BMI* (S.D.N.Y.), BMI is required to offer a per-program license in addition to a blanket license. The difference in the terms of these licenses must be justified by "applicable business factors."[5] Although the form of the BMI decree differs from that of the ASCAP decree,

4. The Decree provides:

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user nonexclusive licenses for rights of public performance;

5. The BMI consent decree provides in part:

(B) Defendant shall, upon the request of any unlicensed broadcaster, license the rights publicly to perform its repertory by broadcasting on either a per program or per programming period basis, at defendant's option. The fee for this license shall relate only to programs (including announcements), or to programming periods, during which a licensed composition is performed. The fee shall be expressed, at defendant's option, either (1) in dollars, (2) as a percentage of the revenue which the broadcaster received for the use of its broadcasting facilities or (3) in the case of sustaining programs or programming periods, as a percentage of the applicable card rate had the program or programming period been commercially sponsored. In the event defendant offers to license broadcasters on bases in addition to a per program or per programming period basis, defendant shall act in good faith so that there shall be a relationship between such per program or such per programming period basis and such other bases, justifiable by applicable business factors including availability, so that there will be no frustration of the purpose of this section to afford broadcasters alternative bases of license compensation.

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the parties have stipulated that CBS could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members. (CX 3)

C. CBS' Complaint

CBS does not allege that ASCAP and BMI have violated the terms of the consent decrees. It claims, rather, that the licensing alternatives which the decrees specify are not flexible enough to meet its needs, and are not realistically available to it. Thus, CBS' complaint charges that the blanket license "compels" it to pay performance royalties with respect to television programs which use no music and that the per-program license requires it to pay the same royalty for a program which uses a single copyrighted composition as for one which uses many. (Complaint ¶¶14, 19). In other words, CBS asserts that defendants are "using the leverage inherent in [their] copyright pool to insist that plaintiff pay royalties on a basis which does not bear any relationship to the amount of music performed." (Complaint ¶19) As to the third alternative specified in the consent decrees—the possibility of bypassing ASCAP and BMI entirely and seeking licenses for the specific compositions it wishes to perform directly from the copyright proprietors—CBS alleges that any attempt by it "to acquire such a large body of rights from the [individual copyright proprietors] . . . would be wholly impracticable . . ." (¶15)

CBS' disenchantment with the blanket licensing system takes form in several legal claims: first, that the writer and publisher members of ASCAP and BMI have combined

through their common licensing organizations to eliminate price competition among themselves and, by pooling the grant of their respective licenses through ASCAP and BMI, to fix the price which a television network must pay to secure the rights; second, that ASCAP and BMI insist on granting only blanket licenses and have therefore imposed an unlawful tie-in, in that CBS is required to purchase the rights to music it does not want to buy in order to secure the rights to music it does want; third, that by forming pools of music and requiring CBS to deal with the common licensing agent of the pools, the writer and publisher members and affiliates of ASCAP and BMI are engaging in a concerted refusal to deal directly with CBS; fourth, that through ASCAP and BMI the writers and publishers are guilty of monopolization, both attempted and achieved; and fifth, that the activities described constitute copyright misuse.

Despite this rather imposing line-up of charges, the central issue in the case is not complex. The essence of CBS' claim is that ASCAP and BMI are illegal combinations whose purpose and effect is to exact royalties from CBS for music it does not wish to license. The validity of the claim turns on whether CBS is in fact compelled to take a blanket license from the licensing organizations in order to secure the performance rights it needs. ASCAP and BMI contend that CBS is not compelled to do so, but has, in common with the ABC and NBC television networks and virtually all radio broadcasters, found it most convenient to license music by the blanket method. Defendants argue that if CBS no longer wishes to secure performance rights

through centralized agents such as ASCAP and BMI, it can obtain the necessary rights directly from the individual members and affiliates of ASCAP and BMI by negotiating with them for performance rights to the particular compositions it wants. As defendants view the case, if CBS is to prevail it must prove that direct licensing with members of the alleged combination is an unfeasible alternative to the blanket license. Proof that licenses could not be obtained directly from copyright proprietors, despite the fact that ASCAP and BMI are required by consent decrees to permit their members and affiliates to license their compositions to users directly, would support the inference that defendants have formed illegal combinations in order to foreclose competition in the market for performance rights to music for network use. Conversely, proof that direct licensing is a feasible alternative method by which CBS could satisfy its music needs would undercut its claims that copyright proprietors have combined to monopolize the market for performance rights and have used their leverage to fix prices and impose unlawful tie-ins.

CBS vigorously disagrees with this view of the case. It argues, as though it could have moved for summary judgment years ago, that ASCAP and BMI are guilty of per se violations of the antitrust laws because the blanket licensing system, which is the only method by which CBS and the other networks have ever licensed performance rights, has "thoroughly eliminated" price competition among copyright owners as a matter of historical fact. (CBS Post-Trial Brief at 15) CBS views the question of the feasibility of direct licensing as irrelevant to the issue

whether defendants have restrained trade. It argues that the sole questions to be determined are (1) whether defendants' restraint is justified or reasonable in view of the unique economic setting of the music licensing market; and (2) whether licensing can be accomplished on a more competitive basis. We find CBS' analysis unpersuasive. Nevertheless, we set forth our views on the questions CBS raises because of their central importance to the case. To do this, we must retrace some of the steps taken to define the issues prior to the trial.

II.

The Issue Presented for Decision

A. ASCAP's Motion for Summary Judgment

At an earlier stage in the litigation ASCAP moved for summary judgment, relying principally on the decision in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968). In *K-91* several members of ASCAP sued a radio broadcaster for infringement. The broadcaster admitted the infringement but defended on grounds similar to those asserted by CBS: that ASCAP is an unlawful combination engaged in price-fixing and block-booking of its members' compositions. In rejecting the claims, the Ninth Circuit observed that ASCAP does not fix prices because, under the 1950 consent decree, the United States District Court for the Southern District of New York is the ultimate price-fixing authority in the event of disagreement as to the reasonableness of ASCAP's fees. As to the other claims, the court observed:

> "No contention is made here that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree.
>
> There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved [by the 1950 decree]." 372 F.2d at 4.

Although we agreed with the *K-91* court, and continue to agree, that the activities of ASCAP and BMI are not illegal per se, we denied ASCAP's motion for summary judgment because of a critical difference between the case presented in *K-91* and the one at hand. In *K-91* the parties stipulated that it would be virtually impossible for broadcasters and copyright proprietors to arrange separate licenses and payments for each radio performance of a copyrighted composition,[6] and no proposal was made to the court of a prac-

6. The United States adopted this position in its Memorandum of Amicus Curiae submitted in connection with the petition for writ of certiorari to the Supreme Court of the United States in *K-91*:

> . . . There are over 4,100 AM and 1,744 FM broadcasting stations located in every part of the United States (FCC Ann.Rep., pp. 106, 110 (1966)). Most of these stations broadcast recorded music for a substantial part of their operating day. They may acquire ownership of any recording they wish, and in the present state of technology there appears to be no effective means by which the enormous number of separate performances broadcast each year by commercial stations across the nation can be accounted for by copyright holders. Nor is it feasible for these stations to deal on a "per piece" basis with the thousands of individual copyright holders across the country in order lawfully to

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ticable alternative to blanket and per-program licenses. In contrast to *K-91*, CBS' claims are premised on the practicability of alternatives to the system now in effect. As noted earlier, CBS seeks an injunction either enjoining ASCAP and BMI even from offering blanket licenses or, in the alternative, and preferably, establishing what CBS calls a "per-use" system, by which ASCAP and BMI (rather than individual copyright owners) would be required to license individual compositions in accordance with a schedule of fees under court supervision.[7] Moreover, far

exploit recorded music, for the value of the right to broadcast a single performance of one recorded composition is far less than the cost of negotiating a separate license. It would appear, therefore, that there must be some form of centralized licensing system which serves the mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished. (Memorandum at 9-10)

7. Under the "per-use" system proposed by CBS, it would continue to license its music through ASCAP and BMI, but in a substantially different way than it does under the blanket license. CBS would pay ASCAP or BMI a specified fee for each performance of a composition in the pool (the "per-use reservoir"), plus an administrative fee. The fee for each use would be fixed in a schedule reflecting the nature of the use (theme, background or feature use) and other appropriate factors such as duration of use, or the popularity of the composition. Thus, the fee schedule would likely provide different prices for otherwise comparable uses of particular compositions. If the fee schedule could not be fixed by agreement between CBS and defendants, it would be set by the court.

Each copyright proprietor would have the right to "withdraw" any of his works from the per-use reservoir on reasonable notice or at periodic intervals (e. g. quarterly). However, the right of withdrawal would not extend to spontaneous or other unplanned uses, nor to music which was filmed or taped prior to withdrawal even though the performance occurred after withdrawal. CBS and its producers would remain free to negotiate a license for a composition directly from the copyright proprietor regardless whether it is in the reservoir or has been withdrawn. The per-use rate schedule would be adjusted at periodic intervals to reflect prices negotiated in direct licensing transactions.

from being a stipulated fact, the impracticability of CBS' "bypassing" ASCAP and BMI to secure licenses directly from copyright proprietors is the key factual issue in the case. Accordingly, we held that the feasibility of less restrictive alternatives to the blanket licensing system presented a genuine issue as to a material fact in the case and denied summary judgment to ASCAP.

Subsequent to determination of ASCAP's motion and in accordance with our holding, we ordered trial of the following specified issues:

> "(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;
>
> (ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anticompetitive means."

B. CBS' "Per Se" Contention

Despite our earlier holding that the activities of ASCAP and BMI are to be judged by the rule of reason and the specification of the issues to be tried in light of that holding, CBS now takes the position that the primary question presented for determination is whether the present system can be amended to operate on a more competitive basis. As noted earlier, it argues as to the first issue, that it has established an illegal restraint of trade as a matter of law because the blanket licensing arrangement has "thoroughly eliminated" price competition among copyright owners as a matter of historical fact. (CBS Post-Trial Brief at 15) Coming after an eight week trial and the accumulation of

a bulky factual record, the timing of this contention is unusual. For the reasons stated below, we find it to be unmeritorious as well.

In support of its contention that ASCAP and BMI are illegal combinations merely because they offer blanket licenses, CBS cites cases in which sellers agreed among themselves as to the prices to be charged buyers for their products. See, e.g., *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The cases are inapposite. Unlike the plaintiffs in the cited cases, CBS does not claim that the individual members and affiliates ("sellers") of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular "products" (compositions) offered by each of them. It makes the very different claim that a combination of individual sellers offering the entire pool of their products through a common sales agent at a negotiated package price is per se illegal, regardless whether the sellers are willing to sell their products on an individual basis.

The claim fails as a matter of law. In *Automatic Radio Co., Inc.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950), the parties entered into an agreement by which Automatic Radio acquired a license for a ten year term to incorporate into its products any or all of several hundred patents held by Hazeltine. Automatic Radio was not obligated to use any of the patents in the manufacture of its products, but agreed in any event to pay Hazeltine royalties based on a percentage of its total sales.

Automatic argued that the terms of the license constituted per se patent misuse and an illegal tying arrangement because the agreement exacted payment of a royalty on all sales whether or not its products used the patents, and in effect required it to purchase licenses for products for which it needed no license as well as for those which did. In rejecting the argument, the Court stated:

> "We cannot say that payment of royalties according to an agreed percentage of the licensee's sales is unreasonable. Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. We are not unmindful that convenience cannot justify an extension of the monoploy [*sic*] of the patent. But as we have already indicated, there is in this royalty provision no inherent extension of the monopoly of the patent. Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them. If it chooses to use none of them, it has nevertheless contracted to pay for the privilege of using existing patents plus any developments resulting from respondent's continuous research. We hold that in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales." 339 U.S. at 834, 70 S.Ct. at 898 (citations omitted).

In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) the Court

refined the standards by which the validity of package licenses are to be judged. At issue in that case was the propriety of an injunction entered by the district court enjoining Hazeltine from:

> "A. Conditioning directly or indirectly the grant of a license to . . . [Zenith] . . . under any domestic patent upon the taking of a license under any other patent *or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent.*" 395 U.S. at 133-34, 89 S.Ct. at 1582 (emphasis in original).

The quoted provision was directed at Hazeltine's proven policy of *insisting* upon acceptance of its standard five-year package license agreement covering some 500 patents, and reserving royalties based on Zenith's total radio and television sales whether or not the licensed patents were actually used in the products manufactured. The Court of Appeals had stricken the last clause of the quoted paragraph, relying on *Automatic Radio* for the proposition that conditioning the license upon payment of royalties on unpatented products was not misuse of the patent. The Supreme Court disapproved this construction of its earlier decision. It distinguished between the situation presented in *Automatic Radio,* in which the parties *agreed* on a package license "as a convenient method designed by the parties to avoid determining whether each radio receiver embodied [a Hazeltine] patent," and the situation in *Zenith,* where the patent holder *compelled* the licensee to choose between a package license conditioned on the payment of royalties on unpatented products, or no license at

all. 395 U.S. at 135-37, 89 S.Ct. 1562.[8] In other words, the critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor.

We disagree with CBS that such compulsion inheres in the present licensing system as regulated by the consent decrees and that defendants are therefore guilty of per se violations. As noted earlier, CBS makes no claim that either ASCAP or BMI has violated any provision of the consent decrees. The terms of the decrees do not by any construction suggest that CBS is in fact compelled to take a blanket license. To the contrary, ASCAP and BMI are required to offer per program licenses under which a fee is charged only with respect to programs in which a composition within the repertory has been performed; and to structure the fees for blanket and per program licenses so that the user has a genuine choice between them. Apart from the licenses available from ASCAP and BMI the decrees leave a music user free to obtain licenses directly from copyright owners. This factor alone markedly distinguishes the present case from *Zenith,* in which Hazel-

8. The Court amplified the distinction as follows:

> If the licensee negotiates for "the privilege to use any or all of the patents and developments as [he] desire[s] to use them" he cannot complain that he must pay royalties if he chooses to use none of them . . . But we do not read *Automatic Radio* to authorize the patentee to use the power of his patent to insist on a total-sales royalty and to override protestations of the licensee that some of his products are unsuited to the patent . . .
>
> We also think patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales . . . 395 U.S. at 139, 89 S.Ct. at 1585.

tine, as the sole supplier of the patents in issue, had, for all practical purposes, unlimited leverage in bargaining the terms of any license to them.

C. CBS' Theory of the Burden of Proof

Taking a different tack, CBS also argues that "it is clear that [ASCAP and BMI] insist on licensing exclusively on a blanket basis" and that because they insist on such an "inherently restrictive" method of sale, they have the burden of proving the availability in the market place of acceptable substitutes, i. e., that CBS could obtain direct licenses sufficient to meet its needs from copyright proprietors. (CBS Post-Trial Brief at 15, 26-27) Neither the facts nor the law support the argument. As outlined later in this opinion, the evidence does not establish that ASCAP and BMI insist or have ever insisted on licensing on a blanket basis; and, of course, if they did, they would flatly violate the terms of the consent decrees.

In any event, the argument fails as a matter of law. CBS cites a number of cases for the proposition that a defendant who argues that the plaintiff can avoid injury by obtaining a substitute product bears the burden of proving such an assertion. See, *TV Signal Co. of Aberdeen* v. *American Telephone & Telegraph Co.*, 462 F.2d 1256 (8th Cir. 1972); *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.*, 432 F.2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 872, 27 L.Ed.2d 826 (1971); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied sub nom., Providence Fruit & Produce Bldg., Inc.* v. *Gamco, Inc.*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952); *Stanton* v. *Texaco, Inc.*, 289 F. Supp. 884 (D.R.I. 1968).

To secure injunctive relief in a private antitrust suit, the plaintiff must prove an actual violation of the antitrust laws or that such violation is impending and that as a result the plaintiff is threatened with loss or injury. *Zenith Radio Crop.* [*sic*] v. *Hazeltine Research, Inc., supra*, and *Credit Bureau Reports, Inc.* v. *Retail Credit Co.*, 476 F.2d 989 (5th Cir. 1973). In the cases on which CBS relies, the plaintiff had indisputably established the first element, i.e., that the defendant had illegally denied him something he wished to purchase, for example, space in a fruit market, access to telephone poles for a cable TV installation, or an aircraft dealership. The defendant in those cases argued that the plaintiff had failed to establish the second element of its claim—injury or the threat of injury—because he had not proven that he could not avoid injury simply by purchasing a substitute product elsewhere in the market. The court in each case held that a plaintiff does not have the burden of proving the non-existence of suitable alternatives in order to prove injury or the threat of injury, particularly when it is clear that no substitute will have the unique attributes of the product which the defendant denied the plaintiff. However, in none of the cases did the court suggest that the plaintiff does not have the burden of proving the first element: the restraint of trade itself.

Accordingly, the validity of CBS' argument that it does not bear the burden of proving that direct licensing is not a feasible alternative to the blanket license turns on whether the issue of "alternatives" relates to the element of restraint, or the element of injury. We believe that it relates to the first factor: that is whether ASCAP and BMI have restrained trade. In the cases just discussed, plaintiff al-

leged that the defendant would not sell him something which he wanted to purchase, and the defendant argued that the plaintiff was not injured by the refusal because market substitutes were available. The present case poses an entirely different claim. The alleged restraint of trade is not that CBS is excluded from purchasing the services offered by ASCAP and BMI, and told to find substitutes elsewhere; but that (1) they allegedly offer only blanket licenses, which CBS says it does not want; (2) have combined to make any effort to obtain an alternative form of license (such as direct licensing) unfeasible; and (3) thereby compel CBS to continue to take a blanket license and to pay for music which it does not want to buy. Unlike the situations in the cases on which it relies, CBS *does not want the organizational defendant-seller's product at all.* Far from spurning "substitute" products, CBS claims that the lack of a substitute constitutes an alleged restraint of trade. So much is clear when one considers the nature of the direct licensing alternative. It is not at all a "substitute" in the sense used in the "injury-avoidance" cases; it is another means of licensing (on an individual basis) the use of precisely the same music which CBS would perform if it purchased a blanket license. If direct licensing is realistically available, it would enable CBS to pay only for the music it uses and for no other music, and would demonstrate that CBS' complaint in this action is unjustified.

In sum, we adhere to our earlier conclusion, as embodied in the pre-trial order, that to prevail here CBS must prove that defendants' conduct in combining into ASCAP and BMI *compels* CBS to take a blanket license as alleged in

the complaint. Proof that direct licensing is not a feasible alternative to the blanket license is an essential element of CBS' claim on which it accordingly bears the burden of proof. Conversely, proof that CBS could obtain the necessary performance licenses directly from copyright proprietors would be fatal to its claim that they have pooled the rights to perform their music in a manner which illegally restrains trade in those rights. If the restraint is proven, only then do defendants have the burden of proving that the restraint is justified by the economic context in which music licensing for network television use takes place, and cannot be achieved by less anti-competitive means.

III.

The Stipulation as to Competitive Disadvantage

Prior to trial, the parties executed a stipulation which states in part:

> ". . . There is a portion of the performance rights to ASCAP music appearing on [CBS] programs as to which it would be impracticable for [CBS] or such producers to negotiate for licenses directly with the owners of the performance rights of said music. [Without limiting the parties' rights to adduce and offer additional proof with respect to any subject, both parties specifically reserve the right to adduce and offer proof regarding the reasons for such impracticability.]" (CX 2, ¶13; bracketed portion in original.)

> "If [CBS] chose not to have an ASCAP license, the producers of [CBS] programs did not obtain such licenses, and [NBC] and [ABC] had such licenses, to

> the extent that [CBS] or the producers of [CBS] programs did not otherwise obtain the performance rights to the ASCAP music which they desired to use on [CBS] programming, [CBS] would be at a competitive disadvantage vis-a-vis [NBC] and [ABC].'[9] (Id. ¶15)

CBS argues that, putting aside its proof at trial as to the impracticability of the direct licensing alternative, ASCAP and BMI have ceded the primary issue in the case by stipulating that CBS could not obtain direct licenses for all its music needs and that consequently, if it dropped its blanket license, it would be at a competitive disadvantage vis-a-vis networks which continued to hold such licenses.

We disagree with the contention that defendants have stipulated the case away. Paragraph 13 does not specify the "portion" of the compositions in the ASCAP repertory as to which it would be "impracticable" for CBS to license directly; and the extent of "impracticability" is critical to the feasibility of direct licensing. As detailed later in this opinion, the evidence establishes that musical compositions are substantially interchangeable and that for any proposed use there are several, if not scores, of compositions which are equally suitable. Accordingly, even if CBS had access to far less than all of the compositions in the ASCAP and BMI repertories, that would not in itself render direct licensing unfeasible.

Because a fair reading of Paragraph 13 does not indicate that ASCAP and BMI have admitted the unfeasibility

9. BMI has stipulated with CBS that with respect to the practicability of CBS' obtaining direct licenses from BMI writers and publishers, BMI and CBS are bound by the determination in this case with respect to the practicability of CBS' obtaining direct licenses from ASCAP writers and publishers.

of direct licensing, Paragraph 15 loses the dispositive force which CBS attributes to it. It is obvious that CBS might be at a competitive disadvantage vis-a-vis other networks if it held no music license. But that fact only raises, but does not settle, the question of what licensing methods are available to CBS. We regard the stipulation merely as an aid to the definition of the issues of the case. The extent of CBS's use of music, the kinds of compositions it needs, and the persons with whom it must deal to negotiate licenses for them are factors whose relevance to the feasibility of direct licensing is only suggested by the stipulation, on which the parties reserved the right to offer proof. The decision in this case rests on the evidence as to those factors, not the stipulation itself. Accordingly, we turn to the question whether CBS is in fact "compelled" as alleged in the complaint.

IV.

Compulsion: The Quality of the Evidence

Defendants argue that CBS' case, which alleges the refusal of the defendants to license on terms which require CBS to pay only for the music it uses, falters at the threshold because CBS has not shown that it ever made a clear demand on defendants which they have rebuffed. It is true that several courts have imposed such a requirement in treble damage cases based on a conspiracy to deprive the plaintiff of a particular product. See, e.g., *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theaters, Inc.*, 268 F.2d 246, 251 (2d Cir.), *cert. denied*, 361 U.S. 885, 80 S.Ct. 156, 4 L.Ed.2d 121 (1959); *Webster Rose-*

wood Corp. v. *Schine Chain Theatres, Inc.*, 263 F.2d 533, 536 (2d Cir.), *cert. denied*, 360 U.S. 912, 79 S.Ct. 1296, 3 L.Ed.2d 1261 (1959); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). However, the requirement has not be [*sic*] imposed in any case of which we are aware, when the relief sought is an injunction rather than damages. Cf. *Zenith Radio Corp.* v. *Hazeltine, supra; Credit Bureau Reports, Inc.* v. *Retail Credit Co., supra.*

Although we agree with CBS that it is not required as a condition to suit to have been unequivocally refused the kind of license it now seeks, defendants' argument highlights the unusual nature of CBS' claim and the kind of evidence on which it relies. CBS does not claim that it is compelled to take a blanket license because ASCAP and BMI, or individual copyright proprietors, have actually refused or threatened to refuse to negotiate with it for alternative methods of licensing. Instead, its position is that ASCAP and BMI *would* refuse to negotiate new forms of licenses whose fees are based on actual music use; and that individual copyright proprietors *would* refuse to deal with it on a direct licensing basis, or at least make it such a difficult proposition that CBS would be forced to resume its blanket license. Although proof of what might or might not occur under hypothetical circumstances in the future is customary when the plaintiff in a private antitrust action seeks to establish a threat of injury, CBS relies heavily on hypothetical proof in order to establish the existence of the restraint itself—the nonavailability of direct licensing.

The other side of the coin just described is that CBS has made no effort to obtain the kinds of licenses it now

complains defendants are unwilling to grant. Although the absence of such evidence does not establish that CBS is not compelled to take a blanket license, we nevertheless regard it as highly relevant to that issue.

V.

The Break-Up of an Amicable Marriage

Until the institution of the present suit CBS appears to have lived quite happily with the blanket arrangement which it now disavows. Since 1929 it has obtained ASCAP blanket licenses for its various broadcast operations, the earliest one purchased on behalf of a radio station; and when CBS and other broadcasters established BMI in 1939, they agreed to take blanket licenses. Since its establishment in 1946, the CBS television network (CTN) has continuously held blanket licenses from ASCAP and BMI. Since 1950, CBS' negotiations with ASCAP for licenses for its television network have of course been conducted within the framework of the amended consent decree. Although, as noted earlier, the terms of the 1950 decree prohibit ASCAP from negotiating a blanket license prior to determining whether the user would prefer a per-program license,[10] CBS has never applied for relief under the decree complaining that ASCAP insisted on blanket licenses. Nor has the court ever been required to set a "reasonable fee" for the blanket licenses negotiated by the parties from time to time. CBS has never negotiated or held a per-program license from ASCAP or BMI for its television network and has never attempted to fullfill its

10. See note 3, *supra.*

music requirements by bypassing either organization and securing performance rights directly from copyright owners.

This suit did not follow a breakdown in negotiations for a new form of license, but for a renewal of CBS' *blanket* license from BMI. In April, 1969, CBS and ASCAP submitted for court approval agreements providing for final license fees as adjusted for 1969 and several prior years. Because the payments provided for in the agreements would have had the effect of sharply widening the historical ratio between BMI and ASCAP fees from CBS, BMI's President, Edward Cramer, protested to Donald Sipes, CBS' Vice President in charge of business affairs for the network, that BMI would insist on maintaining parity with ASCAP. After several meetings between Sipes and Cramer in 1969 during which the latter was unable to negotiate higher fees, BMI gave notice on October 29, 1969 that it was exercising its right under the consent decree to terminate CBS' license, effective January 1, 1970.

CBS did not apply for relief under the decree. Instead, on December 19, 1969, more than a month and a half after BMI's notice of termination, and less than two weeks before termination would become effective, the President of the CBS television network, Robert D. Wood, wrote to ASCAP and BMI requesting each of them to "promptly submit to us the terms upon which you would be willing to grant a new performance rights license which will provide, effective January 1, 1970, for payments measured by the actual use of your music." This was the first such demand CBS had made. By letter dated December 23,

1969, Herman Finkelstein, ASCAP's general counsel, replied that ASCAP would consider the proposal at its next Board of Directors meeting on January 29, 1970; that it regarded CBS' letter as an application for a license in accordance with the consent decree; that CBS would in the meantime have an interim license for 60 days "at rates and terms to be negotiated, or determined ultimately by the court;" and that representatives of ASCAP would meet with CBS counsel on January 12, 1970 to discuss the application further. (PX 201)

By letter dated December 23, 1969 Cramer replied to CBS' request on behalf of BMI and stated that "The BMI Consent Decree provides for several alternative licenses and we are ready to explore any of these with you." (PX 202) CBS did not, however, pursue the matter further. Instead it commenced this lawsuit a week later, on December 31, 1969.

Neither the history of the relationship between the parties nor the events leading to this action remotely suggest that CBS has been compelled to take a blanket license it did not want. Indeed, CBS does not even appear to have seriously considered available alternatives to the blanket license prior to the commencement of suit. CBS' Vice President in charge of business affairs and planning for the network, Donald Sipes, was its principal witness as to the undesirability of blanket and per program licenses, and the need for a license under which the fee would be based strictly on actual use. Sipes testified that he first decided to explore alternatives to the blanket license sometime in 1968 or 1969. Although he was almost completely

unacquainted with the intricacies of music licensing, he spoke to only three people in the course of his exploration. Two of these, Robert Evans and John Appel were house counsel for CBS. Sipes spoke to them only in their capacity as counsel, and did not seek their advice on the business aspects of licensing. The third person Sipes consulted was Emil Poklitar, the CBS employee in charge of the clerical personnel who process music logs and case sheets submitted by program producers to be sure the necessary rights have been cleared. Poklitar is not a business man and his duties involve a narrow portion of the music licensing spectrum.

Despite Sipes' lack of expertise, neither he nor his colleagues at CBS consulted any music writers, publishers, television producers or any other expert in the field about possible alternatives to the blanket license. (Tr. 151, 204, 358, 371) No one at CBS ever conducted a feasibility study about presently available or proposed methods of licensing the music to be performed on its television network. (Tr. 156-57) Indeed, Sipes testified that he did not even speak to other CBS executives about alternatives to the blanket license; he considered the alternatives entirely on his own initiative. (Tr. 180, 369) In sum, CBS thought very little indeed about revising its licensing practices prior to Robert Wood's "demand" letter to ASCAP and BMI just prior to the commencement of this suit. The evidence described hardly supports CBS' contention that it has been compelled to take a blanket license. To the contrary, it suggests that CBS did not even view music licensing as a business problem until immediately prior to suit.

VI.

The Claim That the Structure of the Market Bars Direct Licensing

In the absence of direct evidence that ASCAP and BMI and their members and affiliates have refused to negotiate licenses which reflect actual music use, CBS' claim that it is compelled to take a blanket license hinges on proof that the direct licensing alternative which exists in theory under the consent decrees is not a viable method for securing the necessary performance rights.

CBS claims that it established at trial that the defendants have structured the market in such a way as to lock it into a blanket licensing arrangement and to make any attempt to license its music needs directly so prohibitively risky as to preclude it even from trying. The basic elements of this claim are illustrated by the following syllogism: First, it would be uneconomic for CBS to attempt direct dealing while it still holds a blanket license, because it would then be paying twice for the same music: that is, since the blanket license fee covers unlimited use of the ASCAP or BMI repertory, direct licensing transactions would involve the purchase of additional licenses for music already covered under the blanket arrangement. Second, because copyright proprietors and television networks have never engaged in direct dealing, the transactional machinery necessary to negotiate and clear direct licenses between CBS program producers and the large number of individual copyright proprietors has not been developed; and the absence of such machinery creates a "barrier" to direct licensing. Third, because the blanket license system

insulates copyright proprietors from price competition among themselves, they have no incentive to create the necessary machinery, and indeed would refuse to deal with CBS if it attempted to license its needs directly. Fourth, the risk of a refusal to deal is particularly acute in relation to CBS' present inventory of programs and films, which contains a large number of performances of copyrighted music whose initial runs on television were licensed under a blanket license. If CBS dropped its blanket license, it would need to seek direct licenses for the music contained in any programs which it plans to rerun because a rerun constitutes a performance for profit. Accordingly, the CBS inventory would be vulnerable to "hold-ups" by copyright proprietors who could either refuse to license their music at all, or exact a premium price for it.

In sum, CBS claims to have established that because there is at present (1) no market machinery for direct dealing; (2) no expectation that it will be created; and (3) reason to believe that proprietors would refuse to deal with CBS, particularly with regard to programs in its existing inventory which it wishes to rerun, direct licensing is not a feasible alternative and defendants illegally compel CBS to continue to take a blanket license. To understand the evidence relating to these claims, it is necessary first to describe the nature and extent of CBS' use of music.

VII.

CBS' Use of Music

Music is used on network television in three principal ways: as theme, background or feature music. Theme music is the music used to introduce and close a program.

Background music is used to complement action on the screen. Feature music is music used as "the main focus of audience attention" (PX 469); for example, a performer singing a song on a variety show. Occasionally, however, well-known compositions suitable for feature use may be used as background music, for example, "Tea for Two" as background to a tea party scene. CBS concedes that it would be a simple matter for it to obtain direct licenses for most of the theme and background music it uses, and that the key to the feasibility of the direct licensing method is whether it can obtain licenses for the feature music and some of the background music it needs. To understand why this is so, some familiarity with the manner in which television programs are produced is necessary.

As noted earlier, CBS itself produces virtually none of its "entertainment" programming. Apart from the news, public affairs, sports and special events programs—which CBS does produce and which make little use of music—the bulk of the programs broadcast over the network are acquired from independent program production companies, or "packagers." Some of the packagers are well-known Hollywood "majors," such as MGM, Universal and Paramount. Variety shows and some of the filmed serials are produced by smaller production companies, which are sometimes owned by the star of the show. For example, the "Mary Tyler Moore Show" is produced by MTM Company, Ms. Moore's own; and "The Carol Burnett Show" is produced by her husband's company.

Ordinarily, the music used on entertainment serials is almost exclusively theme and background music composed especially for the program. For example, after the pro-

gram has been filmed or taped, the producer typically hires a background composer to view the film, decide which action requires musical background, score the music and arrange and conduct the music scored. The producer pays the writer a fee for this work and acquires the copyright from him, as an "employee for hire." Theme music is created the same way, but the same music is continuously used from week to week over the life of the series.

The producers of most of CBS' regular programs own publishing subsidiaries which acquire the copyrights for the music which has been specially composed for the program. For example, CBS itself owns April Music, which in turn owns the rights to the background music used in "Gunsmoke." The producer of "The Carol Burnett Show" owns Burngood Music and Jocar, which acquire the music specially created for that show such as background music for comedy sketches. Major studios, such as Universal, own major publishing houses, such as Leeds Music, which in turn own the rights to music created for Universal's television programs. The publishing subsidiaries receive royalty distributions from ASCAP or BMI for performance of music on the shows created by their parent company. The royalties are of course a small fraction of the amount the producer receives from CBS for the program package itself. CBS may pay upwards of $200,000. for a one hour episode of a dramatic serial; the publisher's performance royalties for that program may amount only to about $1,500.

This description of the process by which theme and background music is created makes clear that CBS can easily acquire performance rights for such music as part

of the same transaction by which it acquires the program itself. Because the program production company, or its publishing subsidiary controls the rights to music specially created for the program, CBS could license the right to perform that music at the same time and place as the overall right to televise the program.

In contrast to theme and background music, feature music is not usually composed especially for the program. Rather, it is music which has been previously composed, and is controlled by a publisher who is not connected with the program production company. Feature music, and theme and background music whose copyrights are controlled by an "outside" publisher, cannot of course be licensed as a part of the overall transaction by which CBS acquires the program. Instead, in order to obtain rights to such music, it would be necessary for CBS or the program producer to approach the publisher who owns the rights to the music in question. As noted earlier, it is the feasibility of obtaining the licenses to this "outside" music on which the viability of the direct licensing alternate substantially depends.

In order to establish how much of CBS' music needs would require "outside" direct licensing transactions (as opposed to "inside" transactions with the program producer or his publishing affiliate whose feasibility CBS generally concedes) both sides have introduced into evidence computer runs which they claim establish the extent of CBS' music use in the three basic categories. In general the computer runs and the testimony relating to music use verify what the average television viewer would assume. CBS' news and public affairs programs use vir-

tually no music; the staple situation comedy, crime and drama series use almost exclusively theme and background music specially composed for the program; and feature and background music controlled by outside publishers not connected with the program producer is used regularly on a small group of programs: variety shows and variety specials, sports shows (e. g., football halftime shows), late night talk shows, and the "Captain Kangaroo Show."

Although the parties are in agreement as to the general pattern of CBS' music use, they differ in their claims as to precisely how much music CBS uses in each category and how evenly its use of music is distributed over the program schedule.

We believe it fruitless and unnecessary to determine the question whether CBS or defendants have more accurately interpreted the data as to CBS' use of music. It is fruitless because, as both sides concede, the data of record do not permit complete analysis. It is unnecessary because the validity of the conclusions which the parties seek to draw does not at all hinge on the few percentage points which separate the parties. Thus, defendants argue that the available data show that some 85-90% of CBS' programs used only "inside" music which could be conveniently licensed through the program packager, or no music at all; and that the music for another 5% of the programs could be licensed by seeking performance rights from only one "outside" publisher. According to defendants, only 3-4% of CBS' schedule is made up of programs (such as variety shows) which make heavy use of outside music, requiring licenses from several outside publishers. Accordingly, defendants argue, CBS could acquire

the necessary performance rights for nearly all of its programming without the creation of the "machinery" which CBS claims (as discussed below) is required to facilitate transactions between producers and publishers. This assertion is not inconsistent with CBS' argument that, even adopting defendants' figures, direct licensing for the few programs which do make heavy use of "outside" music would be impracticable in the absence of "machinery" to service the large number of transactions which would be required. In short, no matter whose figures are closer to the truth, the question would remain whether the lack of "machinery" destroys the feasibility of direct licensing as an alternative to the blanket license and constitutes an illegal restraint of trade.

VIII.

Are There "Mechanical" Obstacles to Direct Licensing?

A. The Legal Significance of "Machinery"

Prior to trial the parties stipulated that ASCAP members and BMI affiliates "have not established facilities or procedures" for processing requests by music users for direct licenses for performance rights. (CX 2, CX 3) CBS argues that the fact that the individual defendants have not established such "machinery" constitutes a "barrier" to direct licensing which compels it to take a blanket license. (CBS Post-Trial Reply Brief at 29) Putting aside the question of the kind of machinery CBS claims to be necessary and whether its absence does in fact make direct licensing of outside music unfeasible, we disagree with

CBS that defendants' mere failure to have created machinery amounts, without more, to an illegal refusal to deal. (CBS Post-Trial Reply Brief at 27)

As outlined above, CBS has not, in the many years it has held blanket licenses, indicated a wish to fill its music needs by means of direct licensing. There is no evidence of substance that before bringing this suit it ever considered such an alternative in its own business planning. The only expression of its dissatisfaction with the blanket system was the "demand" letter sent by the network President, Robert Wood, two weeks before the commencement of this suit. That letter did not even refer to direct licensing, nor of course to obstacles, such as the lack of "machinery," which arguably prevented CBS from engaging in direct dealing with copyright proprietors. Rather, the letter related only to CBS' request for alternative methods of licensing *through ASCAP* and *BMI*. In short, there is no evidence that CBS gave any thought to the need for machinery, or noticed its absence, prior to this litigation.

It is simplistic, in view of these facts, to argue that "by virtue of [defendants'] preemption of the field, there are absolutely no facilities in existence for . . . direct licensing . . ." (CBS Proposed Findings at 37). The "field" consists of buyers as well as sellers, and by taking a blanket license for twenty years, CBS (as well as other broadcasters) has "preempted" any need for the machinery whose absence is now claimed to constitute an antitrust violation. We are unable to accept the proposition that defendants have had the obligation to create the framework for a direct licensing system, particularly in the absence of any indica-

tion that CBS would ever wish to use it. There is no evidence, and indeed CBS does not claim, that defendants have refrained from creating the necessary machinery for the purpose of injuring CBS. In these circumstances, the fact that defendants have so far done nothing to facilitate direct licensing does not support the conclusion that they are illegally restraining it.

B. Problems Allegedly Created by the Lack of "Machinery"

Putting aside the question whether the mere absence of machinery illegally restrains trade in the market for performance rights, CBS has failed to prove that there are substantial mechanical obstacles to direct licensing. CBS postulates that under its new proposed licensing system it would pass on the job of licensing "outside" music to the production companies. In such a case, inside music would be conveniently licensed through the program packager and its publishing subsidiary. However, the producer would take on the additional job of obtaining rights to the outside music to be used on the program by contacting the publishers in question (or their agents, as described below) and dealing for the performance rights.

CBS' principal witnesses as to the need for machinery were Robert Wright, associate producer of "The Carol Burnett Show," and Edward Vincent, a former staff member of several network programs. Wright and Vincent are in the position of those who would use whatever machinery is required for direct licensing. In general the testimony of these witnesses was not persuasive, and their views on

machinery were vague and abstract.[11] (e. g., Tr. 482-83, 500, 687) Three basic claims emerge from their testimony. First, CBS asserts that the producer in a direct licensing world would sometimes have difficulty in identifying the publisher of a given composition in order to approach him for a license. The argument is based on the fact of life in the industry that publishers' catalogs shift as they buy and sell copyrights, so that the publisher listed on the sheet music or record label may no longer own the composition when the producer wants to license it. CBS further claims that even assuming the producer can locate the publisher, the negotiations will be beset by confusion because, as defendants concede, music publishers have no established procedures for dealing with requests for performance licenses. Accordingly, the argument goes, direct licensing would be impracticable until settled ways of negotiating licenses are developed and publishers train their staffs to handle licensing. Finally, even assuming the producer can speak to the publisher in a language he can understand, CBS claims that difficulty would be caused by provision in certain contracts between writers and publishers requiring that the writer's consent be obtained prior to the grant

11. We note in passing that most of the testimony of Wright and Vincent as to the need for "machinery" related to the peculiar needs of producers of CBS' few variety shows, which make unusually heavy use of outside music and are produced on short production schedules. CBS did not offer proof as to how the needs of variety show producers for "machinery" differ from the needs of producers of programs which use outside music less regularly and in more modest amounts, and in which speed is not of the essence in the licensing transaction. Accordingly, even if we found the testimony of Wright and Vincent to be more persuasive than we do, it would be of limited value to establish the extent of the "machinery" necessary for shows other than variety shows.

of a direct license by the publisher. A provision requiring such consent appears in the form contract of the American Guild of Authors and Composers (AGAC). CBS claims that ASCAP's computer runs of CBS' music use show that some 40% of the outside music it uses is written by AGAC composers, a figure we adopt arguendo; and that the need to obtain writer consents for the use of that music would delay direct licensing transactions and disrupt the tight production schedules under which some programs are produced, particularly variety shows.

For the reasons stated below, we find that CBS' claims as to the effect of lack of machinery are without merit. There are two basic flaws in CBS' general approach. First, CBS' premise that it would abruptly cancel its blanket license and seek to fulfill all its music needs by direct licensing on the next day (see, e. g., Tr. 463, 633, 1874, 1912-13) is utterly unrealistic. If CBS took such a course there might well be problems of the kind just described. But this would not be proof that defendants have created obstacles which render direct licensing unfeasible. As noted earlier, nothing in the antitrust laws requires defendants to maintain well-oiled machinery for direct licensing for the benefit of CBS. Indeed, there is no support in the record for the proposition that CBS could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation. Accordingly, to presuppose, as CBS does, that the feasibility of the direct licensing alternative is to be judged literally as of "tomorrow" miscasts the issue. The proper question, we believe, is whether such mechanical obstacles as exist could be

remedied within a reasonable period prior to cancellation of the blanket license.

The second flaw in CBS' approach is that it postulates that new direct licensing machinery would of necessity be an edifice entirely distinct from the machinery which now exists for the purpose of licensing other kinds of rights in music, in which ASCAP and BMI do not deal. As outlined earlier, the program packager is responsible for obtaining all rights necessary to televise the program except performance rights, which CBS obtains from ASCAP and BMI. These rights include "synch" rights, that is, the rights required for any program which is to be rerun. Program producers now obtain "direct" licenses for synch rights from publishers through "machinery" created for that purpose. Similarly, movie producers obtain from publishers the rights to record and perform the music they use, (i. e., "mechanical rights" or "mechanicals") and there is "machinery" for this purpose as well.

Thus, although CBS is literally correct that "there are absolutely no facilities in existence for the direct licensing of [performance] rights by music publishers or other proprietors" (CBS Proposed Findings at 37), it overstates the issue to assume that such facilities would have to be created "from scratch" (CBS Post-Trial Brief at 40). The narrow question in the first instance is whether, as ASCAP and BMI contend, the machinery which publishers and producers now use to license other kinds of music could be adapted to facilitate the licensing of performance rights as well.

C. A Look at Other Kinds of Machinery

Apart from television performance rights, other rights in copyrighted music include motion picture synchronization and performance rights, and television synchronization rights. While ASCAP and BMI do not deal in these rights, facilities to license these rights directly from copyright owner to user do exist.

The television synchronization right is the right to record copyrighted music on the soundtrack of a filmed or taped program. Such rights are required for programs which are to be rerun, as distinguished from those (such as sports events or certain "one-run" taped programs) which are regarded as "live" performances. The grant of TV "synch" rights is almost exclusively brokered through the facilities of the Harry Fox Agency, Inc., which represents virtually every major publisher, about 3,500 in all. As outlined by Fox's Managing Director, Albert Berman, and by Robert Wright and Edward Vincent, who are members of producers' staffs, the typical "synch" rights transaction starts with a telephone call to Fox from the producer or from Bernard Brody or Mary Williams, synch rights agents located in Los Angeles who represent producers in their dealings with Fox. Because Fox has instructions regarding each publisher's fee structure, (or, more often, is familiar with it on the basis of past experience) it is usually able to quote prices over the telephone for the compositions which interest the producer. The entire transaction, including actual issuance of the license, is completed within two to three days at most. Fox issues several thousand television

synchronization licenses annually, using a basic staff of only two employees.

A "movie rights" transaction consists of the licensing of the performance right *and* synch right in one package for use in a theatrical (as distinguished from television) motion picture. The versatile Fox Agency also represents publishers in the licensing of these rights. The negotiation is similar in form to the TV "synch" rights. As described by Marion Mingle, the Fox employee who handles movie rights, producers call or write to Fox requesting price quotations on a number of compositions. Mingle or her assistant then telephones the publisher and outlines the nature of the film and the kind of use which is to be made of the composition in question, so that he can quote the price for the right. Generally, the producer either accepts or rejects the various quotations on the spot; sometimes, however, he may make a counter-offer which Mingle passes on to the producer. In general, Mingle can quote prices to the producer within two days. She and her assistant license several hundred movies each year.

D. Could Other Kinds of Machinery Help CBS?

As note [*sic*] earlier, CBS claims that the non-existence of direct licensing machinery in the television performance rights field would practically bar direct dealing in several critical aspects: the producer would have difficulty in identifying the copyright owner of a song which had been sold to another publisher; the AGAC writer-consent requirement would delay the licensing transaction and disrupt production schedules; and publishers would be unable to

handle requests for licenses because they have no staffs or procedures for direct dealing in performance rights and have not created a central facility such as the Fox Agency to facilitate contact between producers and publishers. These claims dissolve in view of the evidence as to the licensing of other rights in music.

1. Finding Copyright Proprietors

In most cases the producer of a CBS show would have no difficulty identifying the "outside" publisher of a song for which he wants a performance license because he or his agent already deals directly with that publisher to obtain a synch license for the same song. As former CBS Vice President in charge of programming, Michael Dann noted, any program on tape or film is likely to be rerun, and program packagers usually obtain synch rights at the time the program is produced. Wright, who is on the staff of "The Carol Burnett Show," testified that problems in clearing synch rights are "rare." Edward Vincent, a former staff member of "The Jim Nabors Variety Hour," testified that the Bernard Brody Agency would have no difficulty in giving him the name and address of any copyright owner.

Even if lines of communication to obtain synch rights were not already established, there are several other ways in which a producer could identify the publisher of music he plans to use. Emil Poklitar, who works in CBS' music clearance department stated that CBS maintains a file containing the relevant information on over 100,000 compositions. Indeed, as Wright testified, publishers regularly

barrage television producers with catalogs and brochures to promote the use of their music. Where they have not done so, there appears to be no reason why CBS could not simply request the catalogs of the major publishers. Finally, it should be stressed that in the vast majority of cases, the copyright owner listed on the sheet music or phonograph record is still the owner of the composition in question.

2. The AGAC Writer-Consent Requirement

Nor has CBS proven that the writer consent requirement in the AGAC form contract would cause significant delay in direct negotiations for performance rights. At present, publishers are required to obtain an AGAC writer's consent for television synch licenses for songs over ten years old, and movie synch licenses for vocal use of a composition. (3M PX 31) Although Leon Brettler, Vice President of Shapiro, Bernstein & Co., a major publisher, testified that he has occasional difficulty contacting a writer who is on vacation or has just changed residence, the record establishes that meeting the consent requirement rarely causes delay in the issuance of a license. In addition to Brettler, several publisher witnesses were asked if they had trouble getting in touch with their writers. For example, Edwin H. Morris, who owns a company bearing his name, testified he has had no difficulties in doing so. Salvatore Chiantia, of MCA Music, testified that he is routinely able to locate his writers and obtain their consent. The reason why publishers have little difficulty in contacting a AGAC writer and obtaining his consent

promptly is not hard to fathom: writers are intensely eager to have their work performed on television. Many AGAC writers have simply given advance blanket consent to their publishers to avoid the risk that the producer will, because of time pressures, substitute a different song. As Chiantia stated in a letter to AGAC concerning consents for background uses (PX 84):

> ". . . if we are not able to give licenses to TV film producers at $25. per film, or if we have to obtain the written consent of each writer for each individual use, we would for all practical purposes never get the compositions from our catalogs into current TV films other than in a few rare instances. The writers who have given us their approval are aware of the competitive situation which exists in connection with the use of music in the filmed TV programs produced in Hollywood. It is because of that very reason that they gave us their okay to go ahead." (PX 84)

In the same vein, Louis Bernstein of Shapiro, Bernstein & Co. wrote AGAC:

> ". . . Please bear in mind that the authors and composers who come into our offices are desperately hungry for performances, which means money from ASCAP. A good number of writers have urged us to get them these performances and stop worrying about the AGAC technicalities. Even so, 19 out of 20 writers would gladly give us any authorization in writing, but since we are dealing with several thousand writers, it becomes a difficult job to be so technical." (PX 162)

There is every reason to believe that most writers would either give their publishers blanket consent for perform-

ance licenses, or give it promptly on a use-by-use basis, just as they presently do regarding synch rights. As Chiantia testified:

> "It is no different than the situation with respect to synchronization rights. Why do you have any greater difficulty in this matter than you have in synchronization rights? There are certain synchronization rights that you need that I have to get my writer's permission on and you get them. Why suddenly do you have such a great problem in respect of getting performance licenses where you don't have that same problem in getting synchronization licenses." (Tr. 2970)

3. The Need For Centralized "Machinery"

Although CBS has failed to prove that producers seeking performance licenses could not identify copyright owners, or that the writer consent requirement would significantly delay direct licensing of performance rights, we agree that direct licensing on any major scale would require some central clearing machinery through which transactions could be brokered. Without such machinery, direct licensing might be mechanically feasible, but would be a bulky and inefficient system: for a program producer (or an agent such as the Brody Agency) to contact each of the publishers whose compositions interest him, for every program, would of course be distinctly time-consuming and expensive.

In the past, the Fox Agency has responded to publishers' needs for central "direct-licensing" machinery for new kinds of music rights by expanding its long roster of services. Defendants argue, accordingly, that music

publishers would turn over the job of clearing television performance rights licensing to Fox as well. CBS replies that defendants oversimplify the problem of creating machinery because there can be no assurance that the Fox Agency will agree to take on the job of brokering performance rights. Of course, it is possible that Fox would refuse the opportunity to expand its business. But the lack of hard evidence on the point is chargeable to CBS, not defendants. Never having explored the feasibility of direct licensing, CBS has not given Fox any occasion to consider the possibility of brokering such licenses. In any event, there is no substantial basis for concluding that the Fox Agency would not expand its services to include television performance rights, just as it has expanded in the past to meet the need of publishers for a central agency for movie performance rights and television "synch" rights. However, even if Fox were unwilling to take on the job of brokering performance rights, the creation of a new agency modeled along the same lines need not be the imposing project CBS makes it out to be. Albert Berman, Fox's Managing Director, testified as follows:

> "Q Mr. Berman, you were asked by Mr. Hruska on direct something about suppose publishers ask you to take over licensing of public performances on network television. Do you remember that question?
>
> A Yes.
>
> Q And as I understood it, you said that you wanted to make a study before giving a detailed answer.
>
> A Yes.
>
> Q Let me ask this, sir: Would the task be significantly different from the task you now have when licensing TV sync [*sic*] rights?

Appendix B

> A Only in numbers. It is certainly much more formidable merely because the uses would be so much greater. But the job could be done, I assume, with enough people and enought [*sic*] physical equipment." (Tr. 973-74)

Berman did not testify, and CBS did not offer proof, as to how many people and how much physical equipment would be required. According to CBS' projections, which we adopt arguendo, the number of direct licensing transactions required each year from outside publishers would range from approximately four thousand to eight thousand. (The low figure is projected from a period in 1971 when CBS had three night-time musical variety series; the high figure is based on a period in 1970 when it had seven such programs. CBS does not make a projection for the season which began in the Fall of 1974, during which it offered only one variety serial, "The Carol Burnett Show.") The question is whether CBS' projection of some 4,000 to 8,000 transactions would entail a large number of complex tasks requiring a massive staff, or a simple task repeated four thousand times by a relatively modest one. CBS' post-trial submissions strain to give the impression that each time a producer wished to use a certain type of composition, Fox or its newly created equivalent in the performance rights field would have to contact several different publishers, who in turn would have to check whether the AGAC writers (if any) whose music is involved would give their consent to the grant of a license, and then begin active price negotiations for the song or songs in question. (CBS Post-Trial Brief at 37-44, Reply Brief at 39-40).

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It is unrealistic to assume that such cumbersome procedures would be involved in a direct licensing world; indeed CBS' own papers offer the key to streamlining the job. As noted early in this opinion, CBS seeks as one form of relief in this suit the establishment, under court supervision, of what it calls a "per-use" system. Under the per-use system, as outlined by CBS,[12] musical compositions would continue to be licensed through ASCAP and BMI, but instead of taking a blanket license, CBS would license individual compositions, for which it would pay a specified fee for each use of music from the per-use "reservoir." The fee for each license would be fixed in a schedule reflecting the nature of the use (e. g., theme, feature or background) and other appropriate factors, such as duration of use. CBS suggests that one convenient way to set a fee schedule is to adopt the present formula by which ASCAP and BMI give royalty "credits" to their members and affiliates. (CBS Post-Trial Reply Brief at 71) The question which naturally arises, and CBS does not answer, is why publishers would not readily adopt the same concept of a fee schedule[13] under a direct licensing system,

12. The outline of CBS' "per-use" proposal are [*sic*] set forth at note 7, *supra*.

13. Instead of addressing itself to the feasibility of a fee schedule in a direct licensing world, CBS postulates that a central licensing agency for performance rights would require a "massive" staff because the negotiation of such rights would be more time-consuming and complex than the "cut-and-dried" negotiations which are the rule in the television "synch" rights field: setting a price for the former would involve factors such as the nature and duration of the use and the unique attributes of a particular song (e. g., "Happy Birthday"). The argument is without merit. It is true, as CBS points out, that in most cases television "synch" rights negotiations are fairly clean cut.

(footnote continued on next page)

in which case a centralized computer would store information as to prices as well as other necessary information for each publisher's catalog.

Of course, it is not for the court to propose a system for direct licensing. Nevertheless, on studious review of the record, we are left with the belief that careful planning would go far to remove any significant "mechanical" obstacles to direct licensing for performance rights. It is true, as CBS points out, that new personnel would have to be trained to handle the task. But the only evidence on the point indicates that new central machinery could be staffed primarily by clerical personnel, as it is at Fox. The period required to train such personnel is presumably measured in weeks or months, rather than years.

Such a finding is supported by CBS' own scenario as to how things would go in the event it prevailed in this suit: either of its proposed forms of relief—the establishment of its "per-use" system under ongoing court supervision; or a mandatory injunction against the issuance of blanket licenses to any network by ASCAP and BMI—would require the development of "machinery" at least as extensive and very much of the same pattern as that involved in

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However, synch rights *and* performance rights for movies are negotiated in a single package; and accordingly the nature of the movie rights transaction provides a more relevant basis for determining CBS' argument that performance rights negotiations would be a complicated matter. As described by Marion Mingle, who handles movie rights at the Fox Agency, the increased complexity of the performance rights transaction amounts to asking the producer about the nature of the intended use and passing on the information to the publisher. (Tr. 870-71, 876-77) Mingle testified that she can generally supply quotations to producers within two days and, as noted earlier, she and a single assistant handle all of the several hundred movie rights licenses Fox issues each year.

a direct licensing system under the consent decrees. For example, if CBS won an injunction against the issuance of blanket licenses, it would of course be faced with the very same mechanical "barriers" to direct dealing of which it now complains so strenuously. Nevertheless, Donald Sipes, CBS' Vice President in charge of business affairs and planning for the network, freely conjectured that in such an event the lack of "machinery" would pose no problem because ABC-TV and NBC-TV would be "in the same boat":

> "A Under that assumption, all three networks are in the same boat. In other words, neither one of the three—that's bad English—but none of them have a competitive advantage, you see, over the others.
>
> Q Assuming that, then what?
>
> A Assuming that with a lot of struggle and some chaos up front, I think again that the machinery necessary to broker deals between the sellers and the buyers in this situation will spring up to fill that gap. There is a need, there is money to be made, and people will spring into that breach to fill that need and make it happen. And deals, direct deals will be made for musical compositions between buyers and sellers.
>
> Now, I do believe, of course, that it will take some time for that machinery to develop up front, but of course all three networks in that situation would have that same problem.
>
> Q Suppose, Mr. Sipes, the injunctive order, in other words the order prohibiting ASCAP and BMI from licensing television networks, the effective date of that order was deferred for a period of, let's say, a year. Would that remove the struggle you mentioned earlier in your answer? Would that solve that problem, in your mind?

A I think that during that time the machinery would develop, yes, sir." (Tr. 79-80)

As we view the matter, CBS is not entitled to relief in this suit simply for the purpose of insulating it from the risk of competitive disadvantage vis-a-vis other networks if it makes the business decision to experiment with a new method of music licensing. If CBS' Vice President in charge of the very subject at hand concedes that within one year suitable machinery would "spring up," no reason appears on this record why it could not in any event plan to change over to direct licensing, effective one year hence, without a court order to spur the effort.

CBS' sole response is that copyright proprietors would not of their own accord leave the safe haven of ASCAP and BMI and expend their resources to set up the machinery for direct dealing because they are afraid to engage in price competition for their works; and that only a court order could provide the "signal" that they must do so. The argument is unpersuasive. Assuming that copyright proprietors would in fact be willing to deal with CBS producers—a conclusion we reach in the next section —they would logically create an efficient mechanism to facilitate it (as they have in the case of other music rights), if only to hold down their own costs. In any event, the cost of creating new machinery would be passed on to music users, just as it is at present through ASCAP, BMI and the Fox Agency.

In sum, as stated earlier, CBS might well have "machinery" problems if it cancelled its blanket license "tomorrow." But this is not proof that defendants have created

"barriers" to direct licensing in order to compel CBS to take a blanket license; it is just as consistent with the fact, which the evidence establishes, that no one, including CBS, imagined that the blanket license would lose its charms until shortly before this suit. Because CBS does not claim that it would commence direct licensing tomorrow (although its counsel often questioned witnesses on the assumption that it would), the relevant question is whether the relatively modest machinery required could be developed during a reasonable planning period. The evidence establishes beyond doubt that it could.

IX.

Would Copyright Owners Attempt to Thwart Direct Licensing?

A. The Nature of CBS' Proof

In the absence of proof that direct licensing is unfeasible because of mechanical obstacles CBS' case rests primarily on its claim that copyright proprietors would refuse to deal directly if CBS asked, or at least make it such an arduous and expensive proposition that CBS would be forced to resume the blanket arrangement. (CBS Post-Trial Reply Brief at 29) Indeed, in a substantial sense, the "disinclination issue," as it has come to be called in the course of the lawsuit, is the major factual issue in the case. As CBS' post-trial papers recognize, even questions such as mechanical feasibility hinge almost exclusively on the willingness or unwillingness of the defendants to smooth CBS' course or obstruct it, as the case may be. (See, e. g., CBS Proposed Findings at 45-47)

Such a claim is difficult to prove even in the best of cases, and the present suit is no exception. CBS' Vice President Donald Sipes testified that CBS has never sought a direct license. The three CBS witnesses who predicted that writers and publishers would refuse to deal with producers were Sipes, and producers Robert Wright and Edward Vincent. Their testimony on the point was unimpressive, particularly inasmuch as none of them had ever spoken to a publisher or a writer in relation to performance rights licensing. Vincent's direct testimony is representative:

> "Q Let's go back to the delays you said you anticipated getting a secretary on the telephone, et cetera. Don't you think that copyright proprietors are going to see to it that all those delays are removed in this world in which the CBS Television Network has cancelled its ASCAP-BMI licenses?
>
> A No, I don't believe that because I am assuming on the basis of this particular lawsuit, that ASCAP and BMI like things the way they are.
>
> If you are asking me to assume that they are going to have a parade for me if I tell them in front I am going to run an end run around their entire organization and attempt to deal direct and circumvent the ASCAP and BMI—
>
> The Court: I don't think that is the question Mr. Hruska asked you. I think he asked you whether you wouldn't expect the copyright owners to make quick arrangements to deal with you if CBS didn't have a—
>
> A No, sir, I don't, and that's the reason I don't. I don't believe that they would want to see that particular system succeed.

> The Court: Do you have any basis for saying that?
>
> The Witness: Well, as I began to state before, your Honor, there is a system under which they are operating now, which I assume for them is a very good system and that they like—" (Tr. 636-37)
>
> • • •
>
> "The Witness: Your Honor, it is my opinion that we are talking about members of a group, of a group that has banded together for a very specific reason, and they have sought the shelter of this group for good and reasonable reasons, again, I assume.
>
> You are also asking me if I think that I am going to expect them to want to deal with me?
>
> The Court: Yes, I am.
>
> The Witness: To come toward me and say, 'Yes, let's make a deal,' after I have circumvented their group.
>
> No, your Honor, I don't believe that prudent business sense dictates that I should believe that.
>
> The Court: I mean that's just on your general experience, you are saying that?
>
> The Witness: Yes, sir." (Tr. 639-40)

Despite the testimony of Sipes, Wright and Vincent that many if not most ASCAP members and BMI affiliates would be "disinclined" to deal directly with producers for performance rights, none of them could give the name of even one actual publisher or writer whom they thought would fall into that category. Sipes has never spoken to a copyright owner. (Tr. 204, 358). Wright, who is associated with "The Carol Burnett Show," was "confident" that ASCAP members would be reluctant to deal with him, but

was certain that Joe Hamilton, who wrote the theme music for the show would be inclined to deal (Tr. 489). Edward Vincent, of the Jim Nabors show, stated that the two writers with whom he had actually worked would deal with him (Tr. 726). CBS' economist Franklin Fisher, also expressed the view that ASCAP members would be reluctant to deal but, like Sipes, he has never spoken to a writer or publisher (Tr. 4853).

In the absence of evidence that any ASCAP member or BMI affiliate has ever refused or even threatened to refuse to grant CBS direct performance rights for any composition, CBS offered evidence as to (1) the strong economic incentives which would deter copyright proprietors from direct dealing (2) the experience of the Minnesota Mining and Manufacturing Company (the "3M" incident) in direct licensing its music needs for a background music tape and tape-player which it marketed in the mid-1960's and (3) the ease with which defendants could thwart a direct licensing attempt by CBS, by exacting premiums for the licensing of music already taped or filmed, (music "in the can") which has until now been covered by a blanket license.

B. The Alleged Incentives to Refuse to Deal

CBS' Post-Trial papers postulate the fact, which we adopt arguendo, that participants in the market for performance rights are rational businessmen motivated by the wish to maximize profits. It excuses its failure to pursue alternatives to the blanket license by arguing that "no reasonably prudent manager of a television network" would subject his company to the risks involved. (CBS

Proposed Findings at 33, 36) By a similar line of reasoning CBS contends that no prudent copyright proprietor would voluntarily relinquish the bargaining leverage and shield against price competition which ASCAP and BMI provide. According to CBS' theory of the case, these essentially hypothetical facts establish both the restraint (i. e., the unavailability of the direct licensing alternative) and the threat of loss (i. e., the economic risk involved in the attempt). We are skeptical of the validity of this general approach, for the issue is not what CBS or copyright proprietors perceive their respective risks to be, but whether CBS has established that its fear that copyright proprietors would in fact attempt to thwart a direct licensing attempt is justified. With that caveat, we turn to the relevant evidence.

It is true, as CBS relentlessly emphasizes, that most of the writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket licensing system. The preference is no surprise in view of the fact that the blanket license is the only way in which performance rights have been marketed to television networks for nearly thirty years. Moreover, the writer-publisher testimony establishes that, from their standpoint, the system is trouble-free and self-executing and the financial rewards are satisfactory. None of them expressed the wish to exchange their present, relatively uncomplicated way of doing business for what they viewed as a new mode involving unfamiliar procedures and possible financial uncertainty.

CBS stresses selected portions of the deposition testimony of several publisher witnesses who expressed them-

selves vigorously when asked to comment on such questions as the possible prohibition of the blanket licensing system. Several common themes pervade the portions of their testimony which CBS stresses: the recognition that there is a large number of publishers and writers who would be competing for exposure on the CBS network; that many of them might face financial difficulties as a result of possible intense competition in a very limited market; and the strong preference for licensing through ASCAP and BMI, which have a measure of bargaining clout in dealing with CBS, the world's largest "consumer" of music.

We may agree that the cited testimony proves that writers and publishers prefer the present system and are apprehensive of dealing directly with CBS. However, this by no means proves the obverse: that copyright owners would refuse to deal with CBS if it discontinued its blanket license and insisted upon dealing on a direct licensing basis. Indeed, the snippets of testimony on which CBS relies are replete with the Darwinian imagery of cutthroat competition among hungry publishers and writers seeking network exposure. The colorful deposition testimony of Leon Brettler, an officer of Shapiro, Bernstein, Inc., is an example:

> "Q Do you think that there would be a good deal of price cutting by publishers in the licensing of performance rights to television networks?
>
> ". . .
>
> A In this case I haven't got the slightest hesitation of saying not that I know, but I am virtually positive there would be a deluge of price cutting bordering on the cutthroat nature that would lead to mutual self-annihilation.
>
> • • •

> "I mean among us competitors who would be so desperate and jockeying for position, none of us having any strength, dealing with one huge user or an industry that is a huge user, consisting of three main entities and we only have those three doors open to us and all 4000 of us converging through that door, I think there would be tremendous amounts of concessions and price cutting and deals." (Dep. 295-98)
>
> • • •
>
> "I think that it would have substantial impact across the board, even to the big companies . . . the largest music publisher is still David compared to the Goliath of the television industry. The so-called top ten are still Davids compared to Goliath and the only time that I have ever heard of David whipping Goliath was in the Bible. Usually Goliath swamps David." (Dep. 302-03)

We do not view this testimony as aiding CBS' case. It tends rather to establish that copyright owners would line up at CBS' door if direct dealing were the only avenue to fame and fortune.

More significant, however, is the fact that, when read in their entirety, the depositions take on an entirely different hue. For example, Brettler testified that "there is no question of the fact that we would negotiate something" if a producer requested performance rights (Dep. 184-85), and that "hordes" of other publishers would do the same. (Dep. 304-05) Edwin H. Morris, who operates another publishing company, expressed anxiety similar to Brettler's. However, far from stating that he would not deal with CBS, he testified:

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"Q Let us assume that telephone does ring, that you are approached by producers and/or network people who are interested in obtaining direct licenses to the compositions or various of the compositions in the Morris catalog. Do you talk to these people?

A Yes.

Q Do you invite them to come into your office?

A I will even go to theirs." (Dep. 211-12)

The conclusion that CBS has failed to prove that the "disinclination" of writers and publishers to leave the blanket system would ripen into a refusal to deal directly is fortified by the trial testimony. Although most of the writers and publishers who testified expressed concern similar to those of CBS' deposition witnesses,[14] all but one of them testified that he or his company would negotiate directly with CBS for performance rights, and most of them believed that their attitudes were representative of others in their position. For example, Arnold Broido, President of the Theodore Presser Company, testified:

"Q • • •

"Let us suppose there came a time when CBS no longer held licenses from ASCAP and BMI and came to you to negotiate or seeking to negotiate direct licenses with you for public performance of compositions in your repertory.

What would be your reaction?

A We would deal with them, of course.

Q Would you tell us why?

A Well, there is really very little else that we could do. We would have no choice in the matter.

14. We note in passing that only one of the four deponents on whose testimony CBS relies in support of the "disinclination" issue was called by CBS to testify at trial.

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We would regret it because, obviously, it would be an inconvenience to us and we would regret the breaking of the relationship but we would deal with them." (Tr. 3492-93).

Broido also stated that:

"the publishers would by and large talk with CBS or anyone else who came to them." (Tr. 3498)

Salvatore Chiantia, President of the Music Division of MCA, Inc., testified:

"My primary responsibility is to get my music played. To get it exposed. And if I have to go to CBS in a direct licensing scheme, I am going to go. I am not going to sit back and say, I hope you fail. I want you to use my music and I am going to try to to make it work." (Tr. 2957)

"There are only three games in town. I have to play one of three games. If we are talking about television, there are only three games in town. If I am effectively cut out from one, I only have two more to play with." (Tr. 2947)

The response of the composers who testified was similar to that of the publisher witnesses. For example, the dean of American composers, Aaron Copland, expressed reluctance to change the blanket arrangement, but testified that he would engage in direct dealing if necessary:

"Q Now, it has been suggested in this lawsuit that in the event that the Columbia Broadcasting System Television Network for some reason or another no longer held a license from ASCAP and BMI it might come to you, as an individual copyright proprietor, as an individual composer, and seek a license from you

for the right to perform your copyrighted work or works.

I would like to ask you, sir, whether if someone from Columbia came to see you you would be inclined or disinclined to deal with them or what would your reaction be?

A Well, I think I would be rather regretful about the need to individually concern myself with the licensing of a particular work, since the present arrangement takes care of a great many of those chores, as I would think of them, and it seems a comfortable arrangement as it now exists, from our standpoint at any rate.

Q If, however, the question were squarely put to you, will you deal with CBS or will you refuse to deal with CBS, what would your answer be?

A Well, I think my answer would be that of most composers. If they want to get a performance, they will do what is necessary to get the performance and if they have to deal with CBS, they would, I suppose, agree to deal with them." (Tr. 3485-86)

Composer John Green testified to the same effect:

"Q Mr. Green, suppose the following hypothesis. That CBS canceled its ASCAP blanket license and NBC and ABC continued to hold blanket licenses from ASCAP and suppose that either CBS or a producer of a CBS film series show came to you and sought to engage you to write the background and theme music for the show.

Would you be inclined or disinclined to negotiate with him for the writing of that music?

A I would be inclined to negotiate with him.

Q Do you have an opinion as to whether other background writers and composers would be inclined

or disinclined to negotiate with CBS or its producers in that situation?

• • •

Q Do you have an opinion?

A I know how I would like to answer that question. I don't have an opinion but I would be surprised if they didn't feel exactly as I do.

• • •

Q Mr. Green, can you tell us why you would be inclined to negotiate with CBS or the producer of the CBS show in that situation?

A For the following reasons. I like to think that part of my motivation is aesthetic and artistic, but I am also a fellow who earns his living by the making of music in various forms. I am also an artist who derives only secondary pleasure from thinking how great my music is when I hear it in my head.

I like to hear it performed and I like to get paid for hearing it performed and you referred to [CBS]—would I be inclined to negotiate with [CBS] for the performance? Well, they are one of the principal outlets in the world for the performance of music and I want my music to be performed, I want the public to hear it, I want to get paid for it and I would be totally inclined to negotiate with anybody who would like to use it.

Q Mr. Green, you have also told us that in addition to your work as a background composer you have written songs in your music career.

Suppose in that situation we posited just a moment ago, CBS canceling its ASCAP license, suppose one of your publishers called you up and told you that the producer of a CBS variety show is interested in using one of your compositions, one of your songs, on a show, and he asked you for your opinion or view, would you

be inclined to recommend that he license or negotiate with CBS or the producer or would you recommend that he not negotiate with CBS or its producer?

A I would recommend that he negotiate.

Q And why?

A Because I would want my song to be exposed and I would also want to derive the revenue that would come from such a source as [CBS] for that exposure." (Tr. 3457-60)

Perhaps it ' not surprising that Walter Dean, who was called by CBS, was the only witness to testify that the publishers for whom he worked would probably refuse to grant licenses to CBS. The publishers are April and Blackwood, companies which CBS owns, and whose catalogs consist mostly of copyrights owned by CBS as well.

Although the testimony of the writer and publisher witnesses persuasively suggested that they would deal directly with CBS, at least *ex necessitate*, our conclusion that CBS has not proven that they would refuse to do so does not rest solely on their testimony. The extensive evidence on the nature of the music industry amply confirms the proposition.

The two most salient features of the television music market are the enormous value to copyright proprietors of network exposure and the markedly limited opportunities for securing it. Copyright proprietors are eager to have their music performed on television not simply to earn performance royalties distributed through ASCAP and BMI, but because a television performance before millions of viewers is the most effective way to sell phonograph records and sheet music, and to generate performances by other music users. No less than eleven witnesses testified to the compelling desire of writers and publishers to gain television exposure for their music. To that end, publishers regularly direct extensive promotional efforts toward the networks, including the mailing of advance copies of sheet music or recordings to producers, performers and musical directors of television shows. Some publishers use promotional brochures or other written materials; others solicit by telephone. The record establishes beyond doubt that even in what CBS characterizes as a comfortable, blanket license world devoid of price competition, television network performances are highly sought by copyright owners.

The eagerness, and occasional desperation, of copyright proprietors is heightened by the fact that there are so few opportunities to win the prize. There are only three television networks and, as noted earlier, few programs which make appreciable use of previously published music; most programs either use no music at all or "inside" theme and background music published by the producer. The testimony of Alan Shulman, Vice President of the Belwin Mills Publishing Corp., aptly summarizes the situation:

"Q Are any of your promotional activities aimed at getting your music played on network television?

A Yes. But there are very, very limited number of opportunities to do this. For example, because of the number—well, they are limited pretty much to the variety shows that appear on the television networks and these are fewer in number of recent years than they were previously.

Q Why are your opportunities limited to the various shows?

A Well, because the other shows are basically prerecorded. Prefilmed, et cetera. The series, et cetera, are done and produced beforehand and the music that is performed and synchronized and used in those programs are pretty must [*sic*] controlled by the producers of the particular program.

And these producers, in fact, very often are publishers themselves who control the publishing rights and, naturally, are not too happy to use other people's music unless they absolutely have to because there is income from it." (Tr. 3083-84)

In fact, apart from variety programs, producers seldom "have to" use "other people's music." With rare exceptions, a considerable number of copyrighted songs are suitable for any use a producer might have in mind. Although every copyrighted composition is philosophically or aesthetically "unique" and its uniqueness is dignified by copyright, virtually none of the four million compositions in the ASCAP and BMI repertories is unique in the mind of a television producer. CBS' producer witnesses Wright and Vincent, testified that "any number" of songs would fit a producer's intended use and that "there would always be, obviously, alternates." (Tr. 419, 586) Copyright proprietors are keenly aware that their compositions are substantially interchangeable with the compositions of other writers and publishers, a factor which could well be expected to dissipate any "disinclination" to deal with CBS, which might othewise exist.

Moreover, CBS' enormous power within the music industry suppocts the testimony of the writers and publishers

who said they would engage in direct licensing. CBS is far more than a television network. It is, as Michael Dann, former Senior Vice President of CBS in charge of programming testified, "The No. 1 outlet in the history of entertainment" and "the giant of the world in the use of music rights." (Tr. 3374) CBS is the largest manufacturer and seller of records and tapes in the world (Tr. 4615); it owns radio and television stations in a number of major metropolitan areas. On CBS' own theory that composers and publishers belong to the race of economic men, it is doubtful that any copyright owner would refuse the opportunity to have his music performed on CBS, much less wish to incur CBS' displeasure. It would risk not only the loss of CBS performance royalties, but royalties from the sale of records sold by CBS subsidiaries and from radio plays of their records on fourteen radio stations operated by CBS in the seven largest cities in the nation.

Moreover, many of the largest publishers are, like April and Blackwood, subsidiaries of large entertainment companies. A number of the named defendants or their parent corporations are program packagers or movie distributors who compete to sell their products to CBS. For example, Famous Music is owned by Paramount and Leeds Music is owned by Universal. The royalties received by these publishing subsidiaries are a small fraction of the amount CBS pays for the program or film. It would be a rhetorical question to ask whether such producers would risk the sale of a program package to CBS because of the disinclination of its publishing subsidiary to engage in direct dealing for the music performance rights.

C. The "3M Incident"

In support of its disinclination theory, CBS also relies heavily on the experience of the Minnesota Mining and Manufacturing Company (3M) which sought direct licenses from publishers in connection with its marketing, in the mid-1960's of a tape and tape player (the M-700 project) designed to provide 24 hours of background music. The M-700 was designed for use in small commercial establishments, such as restaurants, stores, and doctors' and dentists' offices.[15] To this extent, the M-700 was similar to the packages offered by other vendors of background music services such as the well-known Muzak. In one important respect, however, it was different: 3M planned to sell its tape outright, while other vendors leased theirs for a limited term.

3M retained Allen Arrow, an attorney, to negotiate performance licenses for the M-700. Initially, Arrow approached ASCAP for licenses but during the ensuing discussions several problems arose. For example, ASCAP wanted, and 3M did not want, different rates for different classes of users. According to Arrow, ASCAP took the position that the consent decree, which prohibits it from discriminating between similarly situated licensees, barred it from offering a "one class" license because it would discriminate against vendors of background tape systems for larger establishments, such as Muzak and Seeburg. In addition, ASCAP found serious difficulty in 3M's proposal to sell its tape outright because ASCAP would be required,

15. We assume that the 3M project was not designed for the extensive play it has received in federal court.

after the expiration of an initial three year license term, either to try to relicense 3M's customers for a renewal term or, if they refused, to fight a losing battle trying to police possible infringement in a number of small establishments whose individual royalty payments would amount to some $10. per year. Although 3M, as a potential user, was entitled to invoke the licensing and rate-fixing procedures available to it under the consent decree, Arrow testified that 3M chose not to take that course because of time pressures in assembling the project and other such factors. In the circumstances, ASCAP suggested to 3M that it deal directly with copyright proprietors.[16]

There is considerable evidence that the publishers 3M approached viewed the M-700 proposal with some reservations. Some of them were concerned about the novel form of license 3M sought; others about the policing problem; others about the amount of money involved; and still others about the implications of such a proposal for the traditional ASCAP structure and their customary way of doing business. Nevertheless, 3M signed contracts with 27 of the 35 publishers it approached. It obtained all of the music it needed within its time schedule at a cost of about three quarters of the amount of its first offer to ASCAP.[17] Shortly thereafter, 3M began another success-

16. Because 3M was able to license its needs for BMI music from BMI, it did not seek licenses from its affiliates.

17. 3M's first offer to ASCAP was $27. per tape for three years (3M PX 2). ASCAP was asking between $21. and $30. per tape *per year*, or a total of $63. to $90. per tape for the initial license period (3M PX 7). For its direct licenses, 3M paid $21. per tape per year. Thus, it paid $6. less per tape than the amount of its first offer to ASCAP.

ful program to obtain licenses for a second series of M-700 tapes.

Although the statistics do not favor its case, CBS stresses the fact that 3M was able to reach agreement with "only" 27 of the 35 publishers it approached. It argues that a large music user like CBS could be expected to meet considerably greater resistance in a direct licensing effort than 3M, whose rather modest needs for direct licenses could not have threatened to topple the ASCAP structure. Defendants argue, on the other hand, that the 3M incident demonstrates that direct licensing is feasible. It points to the fact that, in the last analysis, 80% of the publishers 3M approached put aside whatever "disinclination" they might otherwise have had to direct dealing, and engaged in business negotiations over a business proposition.

We hesitate to give important weight to the 3M incident as evidence of the likelihood that copyright proprietors would attempt to frustrate CBS' efforts to engage in direct licensing. In the first place, 3M is hardly as large a music user as CBS. Moreover, it sought licenses for a highly fragmented group of small users, rather than for a huge television network. Finally, the form of license which 3M solicited, involving a package of compositions from a publisher for a three year term is not comparable to a license for one performance of a single composition before an audience of millions. In short, CBS and copyright proprietors would be trading for a very different horse than did 3M and the publishers which it approached. Moreover, the evidence as to the 3M incident was developed in large part through documents and deposition testimony;

and included considerable hearsay in the testimony of Allen Arrow. We cannot give significant weight to arguments as to the state of mind (e. g., disinclination) of the publishers approached by 3M based on such evidence. Nevertheless, CBS has made the 3M incident a central part of its disinclination claim. For the reasons set forth below we find that the incident, if it proves anything at all, establishes that copyright proprietors would deal with CBS for direct licenses.

In our view, the bare fact that 8 of 35 publishers were unwilling to sign a contract with 3M has no legal significance; the only relevant question is why they did not. To the extent that the motivations of the unwilling publishers can be gleaned from this record, it appears that general opposition to direct licensing and loyalty to ASCAP played a very small part; and that in general where 3M's proposals were rejected there were legitimate business objections to them. We detail some of these below.

1. *3M's Negotiations With Publishers*

Chappell & Co., Inc. was the first publisher 3M approached. Initially, it found 3M's offer very attractive, but ultimately refused it because of concern that the sale of the M-700 tape would, in effect, put a perpetual free performing right in the hands of 3M's purchasers unless ASCAP licensed and policed those rights. Chappell's concerns appear to have been justified because, as matters turned out, only about a third of 3M's purchasers agreed to pay for licenses to use their tapes after expiration of the initial three year term.

3M next approached MPHC, a publishing company owned by Warner Brothers. MPHC's initial response was favorable, but the MPHC official authorized to make a final agreement was ill, and died during the course of negotiations. By the time he had been replaced, 3M had met its licensing needs. In 1967, 3M negotiated and reached oral agreement with MPHC for licenses covering a subsequent series of tapes, but 3M then decided not to consummate the transaction.

Like Chappell & Co., Famous Music Corp. expressed serious reservations about the possibility of policing the renewal term performance rights, and after consulting ASCAP it rejected 3M's proposal. In 1967, Famous resumed negotiations with 3M for a second tape series and a tentative agreement was reached, but 3M dropped the proposition because at that point it expected to make a bulk licensing agreement with ASCAP covering the second series, which as matters turned out, did not materialize.[18]

The Edwin H. Morris Company did not accept the 3M proposal because it thought, in Morris' words, that 3M was "trying to get something for virtually nothing." (Dep. 131) The evidence establishes that Morris had completely misunderstood the amount of money 3M was actually offering; and that he would have negotiated if there had not been a failure in communication. (Dep. 129-31, 137-41)

Irving Berlin Music, Inc., initially turned down the 3M offer for reasons which are not clear. It appears to have been reluctant to license except through ASCAP, largely

18. However, ASCAP and 3M subsequently reached agreement on a license package for a third series of tapes, the "M-1200".

because 3M proposed to use too small a number of Berlin songs to make a different decision worthwhile. Berlin changed its mind as to the second tape series but again 3M backed out in anticipation of licensing these later tapes through ASCAP.

By the time 3M approached The Richmond Organization it had made sizeable deals with other publishers. Accordingly, it was unwilling to guarantee the use of a sufficiently large number of Richmond songs to make the transaction attractive. Negotiations broke down on that issue. For Richmond, as for other publishers, policing was a problem directly related to the number of songs to be used: above a certain threshold, the cost of relicensing and policing might have become economically worthwhile. For Richmond, that threshold was not reached. Subsequently, Richmond contacted 3M's representative to express its interest in the 3M program, but because 3M wished to use only about 12 Richmond songs, negotiations again fell apart.

In addition to these publishers, 3M failed to conclude agreements with Robbins, Feist & Miller, Bregman, Vocco & Conn, and Frank Music. The first two publishers were the only ones whose reluctance to deal appears to have been motivated from a sense of devotion to ASCAP. Frank Music refused 3M's offer for the initial series of tapes because, like Richmond Brothers, it was concerned about the related problems of policing and the number of tapes to be used. However, it approached 3M to negotiate a license for the second series of tapes and agreement was reached.

We conclude, that, at best, the 3M incident does not favor CBS' case. The publishers which 3M contacted were

offered varying proposals and responded as they thought appropriate to their respective legitimate business interests. Four fifths of them accepted the proposal, the remainder rejected it; and some rejected it the first time around but sought to be included in 3M's second series. The evidence contains no breath of parallel conduct. Those who had fears relating to the problem of relicensing and policing proved to be justified in their fears. Virtually all the publishers responded to 3M's unusual proposal as essentially a clean-cut business proposition; none of them refused entirely to negotiate with 3M. On such a record, no general inference of unwillingness to engage in direct dealing with 3M can be drawn. Even if it could be, it would be unwarranted to impute any such inference to the very different circumstances prevailing in the market for performance rights to music used on CBS.

2. The AGAC Ploy

CBS also stressed the role played by The American Guild of Authors & Composers (AGAC) in the 3M incident in voicing opposition to the issuance of direct licenses by their publishers. AGAC, which is not a party to this action, is a trade association of some 2,400 composers whose traditional concern has been the problems of composers in dealing with their publishers, such as the proper calculation of royalties. About 8% of the writer members of ASCAP and writer-affiliates of BMI are AGAC members. During its 45 year history AGAC has on occasion complained to publishers or to ASCAP and BMI that the interests of its members were not being protected. However, it has never

brought suit against anyone; its principal technique appears to be the enthusiastic use of rhetoric.

AGAC's role in the 3M incident fits this general pattern. Although AGAC responded to the news that publishers had granted licenses to 3M in its typically vociferous way, the actions it took in opposition to the 3M program were untimely and ineffective. 3M started to negotiate with publishers in October, 1964, and by June of 1965 had already licensed the first series of tapes. It was not until November of 1965 that AGAC sent a form letter to publishers protesting that they had failed to secure writer consent for certain songs covered by AGAC contracts and suggesting that publishers refrain from licensing 3M. However, the AGAC letter clearly had no impact on 3M's efforts: it was circulated after licenses had been obtained for the first series, and after the eight publishers who declined the 3M proposal had told 3M of their decision. To this day 3M has continued to obtain licenses for its M-700 series directly from publishers. AGAC has not even attempted to lobby against the practice since 1966.

As CBS points out, a "radical" wing of AGAC which styled itself the West Coast Committee, criticized the AGAC Council for its mild-mannered response to the 3M project, and one of its strident letters appears to advocate a conspiracy by publishers to refuse to deal. However, the central AGAC Council in New York rejected the proposals on the advice of its lawyers.

In sum, CBS has seriously overreacted to the role of AGAC and the West Coast Committee in the 3M incident. Although there is testimony which supports CBS' view that the feelings of some writers run high when talk of direct

licensing is in the air, the significant facts are that AGAC took no effective action against the 3M project and refused to adopt the suggestion of the West Coast Committee that radical action was appropriate. These facts, together with the evidence of AGAC's declining influence over the past ten years, and the strong desire of writers to gain exposure for their work do not support any inference that AGAC would or could take effective action against a direct licensing effort by CBS.

D. The "Music in the Can" Problem

1. The Significance of "Music in the Can"

Television programs or movies which have been filmed or taped are said to be "in the can." Music recorded on the soundtrack of such films or tapes is called "music in the can." At any given time, CBS has a large inventory of programs or feature films, much of which it will rerun over the network. CBS argues that if it cancelled its blanket license, the proprietors of compositions in the can, knowing that the music could not practicably be removed from the soundtrack, would exact premium prices for performance licenses: CBS would be forced to pay these premiums or risk infringement litigation.

CBS claims that by virtue of their leverage, copyright owners of music in the can could easily thwart any direct licensing attempt; and this fact accounts for the "business judgment of the [CBS] management that an attempted by-pass of ASCAP is not a realistic alternative . . ." (CBS Proposed Findings at 60-61). We disagree with CBS'

analysis. Putting aside the fact, noted earlier, that CBS does not appear to have considered the feasibility of direct licensing prior to this suit, evidence of the ease or difficulty with which the antitrust laws may be violated cannot be equated to proof that the violation will occur.

Indeed, even if CBS had proven that some copyright owners would attempt to extract a premium price for their music in the can, that fact alone would not, absent proof of parallel conduct, tend to establish that defendants have violated the antitrust laws. At any point in the normal course of its business, CBS has a sizeable inventory whose make-up is continuously shifting from one season to the next as old programs and films are "retired" and new ones replace them. CBS obviously knew, when it accumulated its current inventory[19] that some form of performance license would ultimately be necessary for the second runs of the programs and films within it. These circumstances, however, do not result from the fact that CBS has continuously taken a blanket license, by "compulsion" or otherwise. To the contrary, they flow from the networks' practice of rerunning films and programs. Regardless what system of licensing CBS uses, its inventory would be vulnerable to "hold-ups" every time CBS puts music in the can without obtaining performance rights for future runs of the program in question. The fact that CBS has failed to secure such rights for reruns of the present inventory is hardly the defendants' fault. No defendant has ever refused CBS a license for any music in the can or out, if for no other reason than that CBS has never asked.

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19. We note in passing that CBS acquired most of its in the can inventory after the commencement of this action (AX 326).

In sum, *any* changeover to direct licensing, even in a world of complaisant composers and publishers equipped with sturdy "machinery" may subject the CBS inventory to hold-ups by the greedy ones among them. However, simple greed, independently expressed, does not constitute a restraint of trade.

In any event, CBS has not proven that its fears of a "hold-up" by copyright proprietors are justified. CBS' principal witnesses in support of its "in the can" theory were its Vice President in charge of business affairs and planning, Donald Sipes, and its economist, Franklin Fischer. Neither of them has ever met a copyright proprietor, nor is either more than cursorily acquainted with the music licensing field. As was true of their testimony on "disinclination," the basis for their conclusion that copyright owners would "hold-up" CBS for rights to music in the can was that it would be economically rational for them to do so (see, e. g., Tr. 1686-87). Even taken alone this is not persuasive evidence, and it is clearly outweighed by the more concrete proof offered by defendants. For example, Albert Berman of the Harry Fox Agency testified that television producers often prepare programs without synchronization licenses and negotiate such licenses *after* the programs are in the can without being "held up."

> "A . . . There is a certain confidence on the part of producers that they will not be held up by publishers when they want to use a song after the fact.
>
> Q Do you have any opinion as to what the basis is for that confidence?
>
> A The basis is that the users and providers of music have to live together. Nobody wants to lock himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action." (Tr. 981a-82)

Moreover, although we need not reiterate at length the basis of our earlier conclusion that no copyright proprietors would wish to fall into CBS' disfavor, the publishers who testified as to the "in the can" problem confirmed that view. Their statements on the point were highly persuasive. For example, Salvatore Chiantia of MCA Music, Inc. testified as follows:

> "A . . . I believe the question here is whether a music publisher would take advantage—let us discard the term holding up—whether a music publisher would take advantage of a situation in which something has already been recorded and a license is subsequently sought.
>
> There have been any number of occasions when that has arisen in the licensing of mechanical reproduction and in the licensing of motion pictures, theatrical motion pictures.
>
> Very often, a theatrical motion picture will be made and the song recorded and the synchronization license is subsequently sought. In those cases, speaking for MCA, we have never held up anybody. We have never been unreasonable. We have licensed.
>
> In the cases of mechanical reproductions, there are cases in which recording companies actually record a song before ever asking for a license. In those cases we would certainly hold them up if we wanted to, but we don't because it would be bad business practice.
>
> There are some people in our business who make a habit of being unreasonable. There are a number of people. You mentioned Happy Birthday before. There

is another very famous person with whom I have done a great deal of business, who lives in Paris, who makes my life miserable because she refuses to allow me to license under certain circumstances.

Well, those people are generally identified and people watch for them. Certainly in my business of being a music publisher I don't know of any company that has ever had to say, 'Watch out for Chiantia or MCA; they'll get you.'

We know that we are in this business and we intend to stay in this business and the way we stay in the business is by establishing some kind of a rapport and good will with our users and customers.

• • •

We want the door to remain open for us and if you start holding up record companies or the people with whom you do business, you are in real trouble." (Tr. 2895-98)

Even assuming, contrary to the evidence, that some publishers would be drunk with power at having CBS on the spot, CBS has overstated the dimensions of the problem. Most of its inventory is comprised of theatrical motion pictures (i. e., movies), most of whose music is theme and background music controlled by the film producer's affiliated publishing company (PX 994, AX 287, BX 167). The "problem" of licensing this music is similar to the problem of licensing the "inside" theme and background music for CBS' regular television programming: it can be obtained from the producer itself. Of course, the producer *could* hold out for a large premium, but only on pain of losing large sales of his principal product, movies, to one of only three potential network buyers. It does not need to be

repeated that the price of music performance rights is a tiny fraction of the price of a program or film.

Most of the remainder of CBS' in the can inventory is regular programming which is often rerun in the course of a season. As discussed earlier, most of CBS' serials use only theme and background music owned by an inside publisher. The factors just described as to movies in the can apply equally to other programs in the can.

Unfortunately, CBS has not offered evidence regarding the average life span of a given inventory of programs and films (or of categories of such programs and films), or the portion of the inventory which it actually intends to rerun. The absence of such evidence renders the "in the can" argument even less acceptable. For example, it may be that some television serials have a basic life of one year; if so, that portion of the inventory would be "consumed" during the inevitable interval between CBS' notice of termination of its blanket license and the date on which it actually commenced direct licensing for all its needs. For these programs, as well as the programs or films which CBS does not intend to rerun, there would be no "in the can" problem because there would be no need for performance licenses.

2. Commercials "in the Can"

CBS also claims that television commercials containing copyrighted music present a similar "in the can" problem. Advertising agencies do not ordinarily purchase performance licenses for the music they use. Instead they get a free ride on the networks' blanket licenses. Accordingly, CBS argues that if it cancelled its blanket license, a number of commercials "in the can" could not be used unless either

the advertising agency or CBS paid the premium license fee which CBS feels sure would be exacted. The claim is without merit. Only a fraction of television commercials use music at all. (AX 263, AX 264) In those which do, the copyright proprietor is normally the advertiser on whose behalf the music was made. As Paul Marks, ASCAP's Director of Operations testified, "most of the commercials use music that is written directly for those commercials, [by an 'inside' composer] and in the overwhelming majority of cases, almost all the cases, the writer grants all rights to the sponsor or the advertising agency and makes no reservation of any rights to receive ASCAP distributions." (Tr. 2548) Of course, the sponsor or the advertising agency is the last person who might be expected to hold up CBS for licenses to use the music in its commercials.

A minimal number of commercials use previously published music for which CBS or the advertising agency would have to obtain a performance license from an "outside" publisher. For example, of the 1300 commercials created by the J. Walter Thompson Advertising Agency in 1972, only 21 used copyrighted music (AX 263, AX 264), or less than 2%. As to this miniscule percentage, it is worth repeating that few music publishers would hold up CBS or the world's largest advertising agency for a premium if they hoped to have their music used in preference to that of another publisher. Indeed, because commercials have a normal life span of six to eighteen months (Tr. 1873) CBS might well avoid any problem otherwise posed by "commercials" in the can simply by giving reasonable notice of the cancellation of its blanket license: most of the commercials in question would have run their short life before CBS commenced a direct licensing system.

X.

A Word About Per-Program Licenses

As outlined earlier, CBS concedes that it could license the music for most of its entertainment programs without difficulty by requiring the program packager to deliver performance rights together with the rest of the package. A substantial portion of CBS' other programming, such as news and public affairs programs, makes little or no use of previously published music. As to these two large categories, therefore, CBS could license the music used on an other-than-blanket basis. The programs which make by far the heaviest use of "outside" published music are weekly variety shows and variety specials, late-night talk shows, and the "Captain Kangaroo Show," which in the aggregate comprise a very small portion of CBS' program schedule. Assuming, contrary to the evidence, that the changeover to direct licensing would necessarily meet with mechanical problems until the "machinery" was properly oiled and adjusted, such problems would be acute only in relation to the few shows, such as variety shows, which regularly use music of outside publishers and are produced on short production schedules. For such shows, where speed and efficiency in clearing performance rights may be at a premium, a per-program license, which the consent decrees require ASCAP and BMI to offer, could be a logical alternative. Such a license gives the user unlimited access to the entire repertory, but requires him to pay only with respect to programs which actually use ASCAP (or BMI) music.

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Although CBS has never sought to negotiate with ASCAP or BMI for a per-program license, it argues that such a license is not a feasible alternative. The argument is based on the assumption that the provisions of the per-program license negotiated between ASCAP and an All Industry Committee of owners of local television stations would be imported wholesale into any per-program license for network television use. (CBS Proposed Findings at 108-09) The local television license form provides that the station can avoid paying a per-program license fee for certain uses (e. g., motion pictures) only by obtaining direct licenses for all of the music contained in the program and by giving ASCAP seven days' notice of the direct license. CBS claims that such a license would not meet its needs because of the possibility that for a given variety program it might be successful in obtaining direct licenses for, say, only 90% of the music it needs, but would still need to purchase a per-program license at the full rate to cover the remaining 10%.

The argument overlooks several critical facts. CBS is of course not bound to agree to the terms of the local station per-program license, nor may ASCAP or BMI insist on any particular terms. To the contrary, they are required by the respective consent decrees to offer per-program licenses on terms which are justified by applicable business factors[20] and which give the user a genuine choice between it and other forms of license, such as the blanket license. Because CBS has never sought to negotiate a per-program license, there is no way to know what its

20. See notes 3 and 5, *supra*.

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terms might be. For example, there is no legal obstacle and no evidence of an unmanageable factual obstacle which would prevent it from bargaining for a license which gave it "credit" (i. e., a reduced rate) where it had obtained direct licenses for part of the music to be performed on the program in question. Indeed, because the decrees enjoin ASCAP and BMI from interfering with the direct licensing of compositions,[21] on the face of it, it would appear that CBS could argue in consent decree proceedings, if necessary, that ASCAP and BMI are required to offer a per-program license whose price is reduced to reflect the number of direct licenses obtained for the program. In view of these facts CBS' claim that the per-program license is not suitable for its needs is, at best, premature. Indeed, because CBS makes heavy use of "outside" music on very few programs, there appears to be no reason why CBS could not feasibly turn to a combination of direct licenses, for shows using inside music or outside music of the one or two publishers; and per-program licenses, for those programs on which it makes heavy use of outside music.

XI.

Summary of Findings

On review of the record, we conclude that CBS has not met its burden of proving that defendants illegally restrain trade in the market for performance rights for network television use, and compel it to take a blanket license as alleged in the complaint. CBS has failed to prove that there are significant mechanical obstacles to direct licens-

21. See note 4, *supra*; CX 3.

ing. Nor has it established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license.

Even assuming, contrary to the evidence, that many publishers and writers would initially adopt a wait-and-see attitude under a direct licensing system, it is clear on this record that any resistance they might manifest would quickly dissolve, and that CBS could easily fill its music needs in the meantime. The music industry is highly fragmented. There are over 3,500 publishers and many thousands of composers who are eager for exposure of their music, and well aware that their compositions are, with rare exceptions, highly interchangeable with others. In such circumstances, for direct licensing to fail CBS would have to be met with extraordinarily coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur.

We are left with the strong impression that CBS has exaggerated the risks involved in dropping its blanket license and sought a legal solution to what is essentially a business problem. The risks which CBS claims are posed by direct licensing realistically exist only if CBS ignores its own axioms about "reasonably prudent" network managers (e. g., CBS Post-Trial Brief at 33, 36) and abruptly cancels its blanket license. There is little question that if CBS took such a course, its licensing efforts would produce temporary confusion and disarray. However, the taking of such a voluntary "risk" cannot itself act as a

predicate for defendants' antitrust liability. Conversely, and more significant, CBS has considerable control over the degree of risk which a direct licensing attempt would involve. Assuming a reasonable period of preparation prior to the commencement of full-scale direct licensing, there are a number of steps CBS could take to assure the success of its efforts, particularly given its leverage with program packagers and, by extensions, with their publishing subsidiaries. For example, prior to cancellation of its blanket license, CBS might negotiate with the producers of its programs and films using "inside" music to secure favorable prices for licenses for music "in the can," and for music contained in new programs to be shown in the upcoming season; it could build up a large reservoir of music by requiring program packagers affiliated with major publishers to make their catalogs available for direct licensing in accordance with a fee schedule; it could negotiate with independent publishers for either "mini-blanket" licenses covering their catalogs or direct licenses using a fee schedule; it could send notices to all publishers of its intention to seek direct licenses for compositions in their catalogs; it could negotiate a per-program license with ASCAP and BMI whose fee would reflect the amount of music actually performed and failing that, it could bring proceedings under the consent decree.

There is an astonishing lack of evidence that CBS considered such possibilities, or even the feasibility of direct licensing as a general proposition before commencing suit. The fact that it did not do so does not in itself defeat its claims, but it has rendered the nature of its proof at trial largely speculative. CBS' evidence was

for the most part addressed to such abstract issues as "disinclination," and brought out through the generous use of hypothetical questions. However, it is proof of the threat of actual anticompetitive conduct, not possible "disinclination" which violates the antitrust laws. CBS might have obtained such proof by attempting to negotiate direct licenses. The proof which it chose to offer instead, as to the alleged fear or disinclination of copyright proprietors to engage in direct dealing, is not sufficient to establish an illegal restraint of trade. Such evidence does not prove that CBS needs, as it claims, the "signal" of a judgment in this suit to bring about a direct licensing system; it indicates rather that CBS has the power to give a clearly audible signal itself.

XII.

Conclusions of Law

As stated early in this opinion, the pre-trial order specified the following issues:

> "(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;
>
> (ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anticompetitive means."

The conclusion which inescapably follows from the evidence outlined in the body of the opinion is that CBS has failed to establish that defendants' conduct constitutes an actionable restraint and compels CBS to take a blanket

license. The complaint alleges that defendants' acts and practices in licensing performance rights for network use constitute several distinct violations of the antitrust laws. Because CBS has failed to prove the factual predicate of its claims—the non-availability of alternatives to the blanket license—the complaint must be dismissed. We detail our conclusions of law below.

1. The claim that members and affiliates of ASCAP and BMI have illegally combined to eliminate price competition among themselves must be dismissed because CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them.

2. The claim that members and affiliates of ASCAP and BMI have combined to fix the price at which CBS must license performance rights by licensing those rights only in a package must be dismissed because CBS has failed to prove either that it purchased blanket licenses under compulsion or that the price it paid was fixed. To the contrary, the record establishes that CBS has always negotiated the price for its licenses with ASCAP and BMI.[22] Moreover, CBS has not established that the individual defendants are unwilling to sell performance rights on a direct licensing basis at a negotiated price for each license.

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22. We note, moreover, that contrary to CBS' claim that the blanket license fee is unrelated to the extent of the networks' use of music, the only evidence on the point indicates that the extent of CBS' music usage has always been a significant factor in negotiations for the fee paid on renewals of CBS' blanket license. (Tr. 3611, 3870-72).

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3. The claim that ASCAP and BMI have conditioned the licensing to CBS of music that it wishes to use upon the licensing of music it does not wish to use must be dismissed because CBS has failed to establish (a) that there were two separate and distinct "products" (i. e., groups of compositions, of which CBS wanted to purchase only one); (b) that CBS negotiated with ASCAP or BMI to license only the "wanted" compositions; and (c) that ASCAP and BMI refused to negotiate on that basis and had to coerce CBS to license the "unwanted" compositions as a condition of licensing the "wanted" compositions.[22]

23. In its post-trial reply brief CBS raises a new and somewhat puzzling variation of its claim that ASCAP and BMI are guilty of imposing unlawful tie-ins. CBS points out that ASCAP and BMI offer their members the services of monitoring and policing music uses and collection and distribution of royalties, and claims that neither organization offers such services to any user of music, such as CBS, "*unless* the user accepts a blanket license; and offers none to any member *unless* that member sells through the blanket license" (CBS Reply Brief at 14, emphasis in original). The claim is without merit. As to the first branch of the argument—that ASCAP and BMI condition the sale of their "auxiliary" services to CBS on its purchase of a blanket license, CBS cannot have been the victim of a tie-in because it has never purchased such services; only members and affiliates of ASCAP and BMI have done so. If CBS' claim is construed more charitably to be that ASCAP and BMI would refuse to sell such services to CBS (which CBS could use to induce copyright proprietors to engage in direct dealing) *unless* CBS also purchased a blanket license, the claim still fails as a matter of law: CBS has never sought to purchase "only" services, and there is no evidence that if it did so ASCAP and BMI would condition their sale on the purchase of a license CBS does not want.

The claim that ASCAP and BMI condition the sale to their members and affiliates of their services as licensing agents on their "purchase" (through administrative charges against royalty distributions) of auxiliary services such as monitoring is also without merit. CBS has no standing to assert such a claim because the member or affiliate, rather than CBS, is the alleged victim of the tie. Putting aside the

(footnote continued on next page)

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4. The claim that ASCAP members and BMI affiliates are guilty of a group boycott by forming the ASCAP and BMI music pools and authorizing their licensing agents to license only on terms that foreclose CBS from dealing directly with copyright owners must be dismissed because CBS has failed to prove that the licensing authority of ASCAP and BMI is limited to such terms, is exclusive in fact or that copyright owners have refused or would refuse to deal with CBS directly on an individual basis.

5. The claim that ASCAP members and BMI affiliates are guilty of copyright misuse must be dismissed because CBS has failed to establish that the members or affiliates of ASCAP or BMI have refused or would refuse to license their compositions on a direct licensing basis, or otherwise used their collective leverage to compel CBS to license rights to music which it did not wish to license.

conceptual difficulties presented by CBS' position, there is no evidence that ASCAP and BMI have refused or would refuse to monitor uses and collect royalties on behalf of members and affiliates who engaged in direct negotiations and wished to have the convenience which a central agency offers. To the contrary, there is every reason to believe that ASCAP and BMI would want to preserve this branch of their business even if they were forced to forego the issuance of blanket licenses. In addition, there is no evidence that if necessary copyright proprietors would not readily forego such services to have their compositions performed on CBS. Copyright proprietors certainly do not indispensably need ASCAP or BMI to perform the function of collecting their royalties: the producer using the music would simply remit payment to the proprietor, or to Harry Fox or a similar organization. Nor does it appear that however convenient the present arrangement may be, the producer is indispensably dependent on ASCAP and BMI to monitor possible infringements by a large television network which performs music before millions of viewers; certainly CBS cannot be expected to argue the contrary.

6. The claim that defendants are guilty of monopolization, both attempted and achieved, must be dismissed. The offense of monopolization consists of two elements: possession of monopoly power in the relevant market and willful acquisition or maintenance of that power as distinct from growth as a consequence of a superior product or historical accident. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Attempted monopolization is established by a showing of specific intent to monopolize with a "dangerous probability" of succeeding. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 153, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *Swift & Co.* v. *United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518 (1905). CBS has failed to prove these elements.

To begin with, we disagree with CBS' argument that the relevant market is the market for BMI and ASCAP blanket licenses. The proposition is based on a factual premise which is rebutted by the evidence: that blanket licenses are the sole method for securing performance rights. Manifestly, ASCAP and BMI are not the sole source of the performance rights CBS needs; they are merely the sole source of the blanket licenses which CBS does not want. A market whose only product CBS does not want to purchase cannot by definition, be a relevant market, and the monopolization of a market in which CBS does not want to buy (and in which, of course, it need not buy) cannot injure it.

The relevant market is the market for performance rights to compositions suitable for television network use. The classic test for determining the relevant market in suits brought under §2 of the Sherman Act is whether

products are "reasonably interchangeable by consumers for the same purposes." *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956). Products are said to be interchangeable when they can be used for the same purpose, and when a purchaser is willing to substitute one for the other. *United States* v. *Chas. Pfizer & Co.*, 246 F. Supp. 464, 468 (E.D.N.Y. 1965, Mishler, J.). It is evident (indeed it is CBS' premise in this suit) that a bundle of direct licenses for network performances, acquired on an individual transaction basis, is interchangeable with a blanket license permitting the use of exactly the same music. Moreover, because the evidence establishes that musical compositions are fungible, a virtually unlimited number of *combinations* of compositions (i. e., bundles of licenses negotiated on a direct basis) sufficient for CBS' music needs would be readily interchangeable with a blanket license. Accordingly, the relevant market includes *all* sellers of performance licenses for network use, including ASCAP and BMI, as sellers of blanket licenses, and individual copyright proprietors, as sellers of "direct" licenses.

CBS has not proven that ASCAP or BMI possesses, or has attempted to achieve monopoly power in the market for performance rights for network use. In *United States* v. *Grinnell Corp.*, *supra*, 384 U.S. at 571, 86 S.Ct. at 1704, and *United States* v. *E. I. duPont de Nemours & Co.*, *supra*, 351 U.S. at 391, 76 S.Ct. at 1005, the court defined "monopoly power" as the "power to control prices or exclude competition." CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. We have found that copyright pro-

prietors would deal readily on a price basis; certainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place. Indeed, as noted earlier, the power of ASCAP and BMI to control the price even of their own blanket or per-program licenses is sharply curtailed under the decrees.

Nor does ASCAP or BMI have the power to exclude competition: there is a high degree of interchangeability among compositions, and performance rights to any given type of composition are available from a number of sources if CBS chooses to tap them. In addition to the choice of a blanket license or a per-program license from ASCAP or BMI for any given type or group of compositions, any composition (or combination of compositions) or its practical equivalent could be licensed from several individual copyright proprietors.

Finally, there is no substantial evidence that ASCAP and BMI have attempted to monopolize the market for performance rights for network use. Although at present they are the sole suppliers of CBS' music needs, such a state of affairs has resulted not from any violation of the antitrust laws but because CBS has, since the advent of television, found it convenient to secure a blanket license which, by definition, can be practicably obtained only through a collective licensing agent. The fact that CBS now wishes to change its long standing business practices does not, without more, convert defendants into monopolists.

CBS has failed to prove that any activities of ASCAP and BMI and their members and affiliates threaten it "with loss or damage by reason of any violation of the antitrust

laws" within the meaning of §16 of the Clayton Act. Even assuming, contrary to the evidence, that CBS has established the possibility of an impending violation on the part of some individual defendants, it has not established the threat of loss or damage sufficiently to warrant the grant of an injunction against the issuance of blanket licenses to any television network, or establishing its proposed "per-use" system.

The foregoing constitutes our findings of fact and conclusions of law. The complaint is dismissed.

It is so ordered.

Appendix C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of August, one thousand nine hundred and seventy-seven.

Present:

Hon. LEONARD P. MOORE,
Hon. ROBERT P. ANDERSON,
Hon. MURRAY I. GURFEIN,
Circuit Judges.

75-7600

Columbia Broadcasting System, Inc.,
Plaintiff-Appellant,

v.

American Society of Composers, Authors & Publishers, Stanley Adams, as President of American Society of Composers, Authors & Publishers, Harold Arlen, Samuel Barber, Carl Fischer, Inc., Chappell & Co., Inc., Cy Coleman, Edwin H. Morris & Co., Inc., Elkan-Vogel, Inc., Essex Music, Inc., Famous Music Corp., G. Schirmer, Inc., Morton Gould, Arthur Hamilton, Henry N. Mancini, MCA, Inc., Peter Mennin, Milene Music, Inc., Robbins Music Corporation, Richard Rodgers, Arthur Schwartz, Shapiro, Bernstein & Co., Inc., Warner Brothers-7 Arts Inc., Ned Wash-

ington, on behalf of themselves and all other members of American Society of Composers, Authors and Publishers, Broadcast Music, Inc., Al Gallico Music Corp., Paul Anka, Associated Music Publishers, Inc., Jerry Bock, Duchess Music Corp., Fred Ebb, Edward B. Marks Music Corp., Norman Gimbel, Sheldon Harnick, Hill and Range Songs, Inc., Hollis Music, Inc., John Kander, Charles Koppelman, Maclen Music, Inc., Peer International Corporation, Don Rubin, Screen Gems-Columbia Music, Inc., Joseph Stein, Sunbeam Music, Inc., Unart Music Corp., on behalf of themselves and all others who have granted themselves and all others who have granted Broadcast Music Inc., the right to license to third parties non-dramatic performing rights of their copyrighted music,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By ARTHUR HELLER,
Deputy Clerk

Appendix D

Orders of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-seven.

Present:

Hon. LEONARD P. MOORE,
Hon. ROBERT P. ANDERSON,
Hon. MURRAY I. GURFEIN,
Circuit Judges.

Docket No. 75-7600

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, *et al.*,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the defendant-appellee, American Society of Composers, Authors and Publishers,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO

A. DANIEL FUSARO,
Clerk

Appendix D

MOORE, *Circuit Judge*:

I vote to deny the petition for rehearing with a suggestion of rehearing *en banc*. I do so only on the theory that Part III of the majority opinion remanding for further proceedings requires consideration by the trial court after proof and/or argument of the effect on price competition of the blanket license and some form of per use license. Proof should also be developed which will support or disprove the majority's assumption (thus far unsupported by proof as I see it) that the blanket license "reduces price competition among the members and provides a disinclination to compete". (p. 5189). Such lack of evidence is also conceded by the majority with respect to a finding on "market need". In short, I believe that a rehearing at this time would be premature.

As for ASCAP's argument that further proceedings "will be time consuming and expensive" and as for their desire to try many other issues, this would be a situation of their own making. It would seem to me that the issue of a practical and workable blanket-per use decree need not be befogged by a contention that "CBS's market power is too great".

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held a [*sic*] the United States Court House, in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-seven.

Docket No. 75-7600

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendant-appellee, American Society of Composers, Authors and Publishers, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN

IRVING R. KAUFMAN, Chief Judge

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-seven.

Present:

Hon. LEONARD P. MOORE,
Hon. ROBERT P. ANDERSON,
Hon. MURRAY I. GURFEIN,
Circuit Judges.

Docket No. 75-7600

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, *et al.*,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the defendant-appellee, Broadcast Music, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO

A. DANIEL FUSARO,
Clerk

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held a [*sic*] the United States Court House, in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-seven.

Docket No. 75-7600

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendant-appellee Broadcast Music Inc., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN

IRVING R. KAUFMAN, Chief Judge

Supreme Court, U. S.
FILED
MAY 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PERFORMING RIGHT SOCIETY LIMITED AND SOCIETE DES AUTEURS, COMPOSITEURS ET EDITEURS DE MUSIQUE AS *AMICI CURIAE*

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v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE PERFORMING RIGHT SOCIETY LIMITED AND SOCIETE DES AUTEURS, COMPOSITEURS ET EDITEURS DE MUSIQUE AS *AMICI CURIAE*

The Performing Right Society Limited ("PRS") and Societe des Auteurs, Compositeurs et Editeurs de Musique ("SACEM") submit this brief as *amici curiae* in support of the petitions for certiorari to review the judgment entered by the Court of Appeals for the Second Circuit on August 8, 1977.

INTEREST OF *AMICI CURIAE*

PRS is an association of composers, authors and publishers of musical works which was established in the United Kingdom in 1914 to administer on behalf of its members certain of the rights provided by copyright legislation. It is a non-profit organization whose membership exceeds nine thousand British composers and publishers. It also represents composers and publishers in twenty-six other countries, formerly part of the British Commonwealth, that have no indigenous performing right organizations.[1] PRS is affiliated on a reciprocal basis with performing right organizations in thirty-seven countries, including the United States, that have a similar interest in this case.

SACEM, established in 1851, is the world's oldest performing right organization. It has approximately 40,000 members and, like its British counterpart, represents composers and publishers in twenty-four other countries, formerly part of the French Empire, that have no indigenous performing right organizations. It is affiliated on a reciprocal basis with performing right organizations in over thirty nations, including the United States.

[1] These countries are: Barbados, Bermuda, British Virgin Islands, Cayman Island, Cyprus, Gibraltar, Guyana, Hong Kong, Republic of Ireland, Jamaica, Kenya, Leeward Islands, Malawi, Malaysia, Malta, Mauritius, Nigeria, Pakistan, Seychelles, Singapore, Sri Lanka, Tanzania, Trinidad, Uganda, Windward Islands, and Zambia. Jamaican music, in particular, is widely played in the United States.

In this country PRS and SACEM grant non-dramatic performance rights to mutually exclusive portions of their repertoires of musical works to ASCAP and BMI. By means of the type of blanket license challenged by CBS in this lawsuit, the repertoires of both *amici* have been made available to all the television networks and their vast audiences, as well as to countless television and radio stations, hotels, restaurants, concert halls, and a myriad of other users who perform music publicly. In this way, for over half a century, the music of the foreign composers and publishers who are members of, or represented by, PRS and SACEM has been performed in the United States.

Continued access to the American market, with full opportunity for performances on the television networks, is of vital importance to PRS, SACEM, and their members. For the year 1976, PRS received payments from ASCAP and BMI for performances of musical works in PRS' repertoire of about $3.4 million and $2.7 million, respectively, or a total of about $6.1 million.[2] In that year, SACEM received a total of approximately $1.4 million from ASCAP and BMI.[3] Payments from ASCAP and BMI accounted for more than thirteen percent of PRS' 1976 gross revenues, and a smaller, but still significant, percentage of SACEM's 1976 gross revenues. A substantial portion of PRS' and SACEM's receipts from ASCAP and BMI represents royalties earned by the performance of their repertoires on the television networks under blanket licenses.

PRS and SACEM are thus directly affected by the Second Circuit's holding that the blanket licenses between

[2] Reciprocally, PRS distributed a total of about $4.5 million to ASCAP and BMI, amounts due for the performance in the United Kingdom of works in their respective repertoires.

[3] In the same year, SACEM distributed a total of approximately $2.9 million to ASCAP and BMI for performances of their works in France.

ASCAP and BMI and the television networks are price-fixing agreements illegal *per se* under the Sherman Act.[4] That decision, unless reversed by this Court, will unjustifiably restrict the opportunities of the members of PRS and SACEM to have their works performed, on a fair, non-discriminatory and competitive basis, in this country. The Second Circuit seems to have given no consideration to the effect of its decision upon composers and publishers outside the United States. Yet its ruling threatens the world-wide system of international licensing of musical performing rights—a system that has existed for many decades with the sanction of the Department of Justice and the federal courts, and has functioned efficiently in promoting the progress of musical arts here and abroad.

REASONS FOR GRANTING THE WRIT

I.

The affiliation arrangements among PRS, SACEM, ASCAP and BMI are part of the structure of affiliation agreements among performing right organizations in nearly forty countries throughout the world. The agreements between PRS and ASCAP and BMI are typical. Under these agreements PRS grants to ASCAP and BMI the right to license mutually exclusive portions of its repertoire of musical works for performances in the United States. ASCAP and BMI represent PRS' members and insure protection of their copyright rights in the United States. The ASCAP and BMI repertoires are thus expanded to include PRS' repertoire, including British music and musical works by composers in the

[4] The court also appears to have found ASCAP and BMI guilty of copyright misuse "for essentially the same reasons. . . ." *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 562 F.2d 130, 141 n.29 (2d Cir. 1977), *rev'g*, 400 F.Supp. 737 (S.D.N.Y. 1975).

former British Commonwealth countries listed in note 1 *supra*. Comparable agreements with SACEM similarly enlarge the ASCAP and BMI repertoires to include the works of French composers and others represented by SACEM.

Under these affiliation agreements, when a performing right organization obtains the performance rights to a work in a foreign organization's repertoire, it distributes royalties for performances according to its normal rules and procedures, just as if the work were in its own repertoire. The repertoire of each performing right organization is thus available on a fair and non-discriminatory basis to the other organizations for licensing of performances in their own countries. This structure, which has been in place since the early part of this century, provides a simple, efficient, and equitable method by which foreign composers and publishers may have their music recognized and performed in the United States. The result is a vast enrichment of the inventory of musical works performed in this country. Reciprocally, it provides a fair and workable means whereby American composers and publishers compete for recognition in the United Kingdom, France and throughout the world.

The present system is the product of many years' experience in meeting the special needs and problems of international licensing of musical performance rights. Its economic and cultural benefits are immense. Economically, it establishes a world-wide market in which musical compositions freely and effectively compete, unfettered by national boundaries. Culturally, this "common market" fosters an unobstructed flow, back and forth, of musical creativity throughout the world. For example, British composers and artists, including Ralph Vaughan Williams, Benjamin Britten, the Beatles, the Rolling Stones, and Elton John (all PRS members), have contributed much to the musical scene in the United

States. SACEM's members, such as Michel Legrand, Olivier Messiaen, Dimitri Tiomkin, Jacques Brel and Edith Piaf, have also made significant contributions.

The decision of the Court of Appeals casts a cloud of illegality on this international structure that has been shown by experience to work effectively and fairly for all concerned—the public, the users, and the individual members of the performing right organizations. The decision below would go far toward turning the clock back to the days before performing right organizations came into being to give composers and publishers a practical mechanism for both licensing the performance rights to their musical works and ending piratical performances. Under the rule of *per se* illegality announced by the court below, it is difficult to conceive of any alternative structure—not involving the use of blanket licenses—that could succeed as well in facilitating the international exchange of performance rights.

The concern of the *amici* is neither hypothetical nor undue. The decision below has already brought serious uncertainty to the international system of licensing music. As of March 31, 1978, CBS unilaterally terminated its interim license with ASCAP, a *pendente lite* arrangement that received explicit judicial approval at the time CBS brought this suit eight years ago.[5] CBS is now performing ASCAP's repertoire of musical works, including those of PRS' and SACEM's members, without paying any royalties whatsoever. Relying on the decision below, it is simply appropriating, without regard to copyright, the music of British, French and other foreign

[5] Under this arrangement, approved by the District Court and incorporated into an order in *United States* v. *ASCAP*, Civil Action No. 13-95 (S.D.N.Y., filed August 10, 1970), CBS has paid $4,320,000 per year for an interim blanket license from ASCAP, subject to retroactive readjustment depending on the outcome of the suit. CBS made payments thereunder from the date of the order until its unilateral termination became effective on March 31, 1978.

composers represented by PRS and SACEM whose works have been licensed to ASCAP. CBS' action, we fear, is likely to be only the first evidence of the disruptive impact that the decision below will have upon the international licensing of musical performance rights.

It is not possible to detail all the adverse implications of the Second Circuit's decision for the international exchange of musical performance rights or to foresee all the harm it will do to performing right organizations and their members throughout the world. Most importantly, unless the decision is reversed by this Court, ASCAP and BMI may, as a practical matter, be unable to offer blanket licenses to the television networks—or, indeed, any form of license which, in the court's view, "tampers with" price competition among individual members. 562 F.2d at 136. Nor does it appear that PRS or SACEM would be able to do so directly. Indeed, the opinion below seems to condemn, as illegal *per se*, *any* system of licensing in which individual copyright holders employ a common selling agency which charges a "single price." The Court of Appeals states flatly that whenever "any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained." *Id.* at 136. The extreme sweep of this simplistic view of the *per se* price-fixing rule surely calls for review by this Court.

Other potential consequences of the decision below are also of deep concern to PRS, SACEM and their members. Insofar as the decision contemplates a regime of direct licensing by individual composers and publishers, the members of PRS and SACEM would be placed at a substantial competitive disadvantage *vis-a-vis* American composers and publishers. Direct licensing would require direct contact between the television networks and individual copyright holders or their representatives. A substantial quantity of PRS' and SACEM's music performed

in the United States in recent years consists of works whose copyright holder is not represented in this country (except by ASCAP or BMI). In such cases the practical burdens of transoceanic negotiation—involving time-zone differentials and difficulties in identifying and communicating with particular copyright holders[6]—would almost certainly curtail the use of foreign music by the networks.[7]

While it is possible for foreign copyright holders to obtain representation in the United States, and many PRS and SACEM members already do have agents (called "sub-publishers") in this country, such representation is very costly. An individual copyright holder would have to give up to his sub-publisher between twenty-five and fifty percent of the royalties payable as a result of an American performance. Even those foreign copyright holders who have existing arrangements with American sub-publishers would probably be required to pay more to compensate the sub-publishers for the additional burdens of direct negotiation with the networks.[8] At a minimum, therefore, the Second Circuit's decision would greatly increase the costs to foreign com-

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[6] These practical difficulties would be multiplied many times over for members of SACEM and the large number of other performing right organizations in non-English speaking countries.

[7] An example is the 30 or so TV series or films currently being exhibited or broadcast in the American market that contain musical scores composed by PRS members who do not have representation in this country. The networks have been authorized to perform these scores under their blanket licenses with ASCAP or BMI. In light of the court's decision, any future use of these series and films may require transatlantic negotiations with the individual British composers.

[8] There is also a potential problem of conflict of interest if a single sub-publisher represents several copyright holders whose music may be interchangeable from the networks' standpoint.

posers and publishers of making their music available to the United States market.

To the extent that per use licensing through ASCAP and BMI is compelled by the decision below—a "remedy" logically inconsistent with the court's holding that use by individual composers and publishers of a "single agency with a single price" (562 F.2d at 136) is illegal *per se*—the transactional costs would likewise vastly increase, assuming such a regime is feasible at all. It is difficult to understand how "ASCAP itself" could "provide some form of per use licensing which will ensure competition among the individual members . . . ." (*Id.* at 140.) Would it simply compile and maintain a fee schedule from which the networks would shop? If so, how would such a list (covering millions of works that may be televised in a variety of differing circumstances) be compiled, and how would it be administered if the network, for example, wanted a musical work only at a below-list price or if either of two works was acceptable depending on the relative prices? If there is no fee schedule, what would ASCAP's role be in situations where the network desires music of a kind for which numerous individual compositions may be suitable? Patently, a system of per use licensing would at best be grossly inefficient and at worst totally unworkable. In any case, the inevitable result would be to restrict the flow of musical works from foreign composers and publishers into the American market. PRS and SACEM do not believe that the antitrust laws of the United States—and, more particularly, the judge-made rule declaring agreements on prices by competitors to be illegal *per se*—were intended to have that effect.

II.

Application of the *per se* price-fixing rule to blanket licenses, upon which the present system for international exchange of musical performance rights has long been

based, is an unwarranted extension, and indeed a misuse, of that rule.

Under the decision below, *per se* illegality is automatically established by the use of "a single agency with a single price," thereby "restrain[ing]" competition by individual sellers and "tamper[ing] with price structures." 562 F.2d at 136. The decision equates blanket licensing with price-fixing agreements *simpliciter*. Even assuming, however, that the use of blanket licenses "restrains" price competition among individual sellers, it does not follow that this long-standing practice in a unique industry—which was developed for reasons unrelated to price and has undeniable benefits—necessarily is, or should be, subsumed within the rule of *per se* illegality attaching to price-fixing agreements. The threshold question here is whether the validity of this practice is to be judged by the *per se* rule or the rule of reason. This critical question is begged in the decision below. The Second Circuit assumed, without support in the record in this or any other case, that ASCAP and BMI are as much engaged in price-fixing as the defendants in cases like *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). But an agreement having an effect on prices is not *ipso facto* a price-fixing agreement. Any agreement that restrains competition, whether reasonably or unreasonably, "tampers with" or affects prices in some manner. That does not make it illegal *per se*.

As a prerequisite to classifying any business practice as illegal *per se*, this Court has insisted upon a clear showing, based upon experience and economic realities, that its adverse competitive effects so outweigh any possible benefits that it should be outlawed in every case, without inquiry into the particular circumstances. Only last Term, the Court made "clear that departure from the rule-of-reason standard must be based on demonstrable

economic effect rather than . . . upon formalistic line drawing." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). Similarly, in *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963), the Court declined to invoke a *per se* rule because "[w]e do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' [citing *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958)] and therefore should be classified as *per se* violations of the Sherman Act." *See National Society of Professional Engineers* v. *United States*, —— U.S. ——, 46 U.S.L.W. 4356, 4359 (U.S. Apr. 25, 1978) ("agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . are 'illegal per se;' . . . agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed" must be measured under a rule-of-reason analysis).

Here, there is certainly not enough knowledge as to the "demonstrable economic effect" of blanket licensing of musical compositions "to be certain" that a *per se* rule should be applied. Indeed, the Court of Appeals acknowledged that "[t]here is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need . . . ." 562 F.2d at 140.

Moreover, as Mr. Justice Black stated for the Court in *Northern Pacific*, a practice may not be classified as a *per se* violation unless it is shown to "lack . . . any redeeming virtue." 356 U.S. at 5. In this case, no such claim is or could be made. As the District Court's opinion explains, the blanket license originated in the dual

need of composers and publishers, on the one hand, for protection against piracy of their copyrighted works, and of users, on the other hand, for a "clearinghouse" to obtain performance rights to large numbers of musical compositions. 400 F.Supp. at 741-43. Even the Second Circuit does not regard blanket licensing as "a 'naked restraint' ineluctably doomed to extinction," nor does it deny that a blanket license may "serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable." 562 F.2d at 140.

Thus, to the extent that blanket licensing of musical compositions has been the subject of inquiry in this and other cases, the conclusion that emerges is precisely opposite to that of the Court of Appeals: the demonstrable competitive and other economic benefits of blanket licensing, if anything, outweigh any possible effect on "price competition" between individual copyright holders and, at a minimum, preclude its classification as a *per se* violation.

The inappropriateness of *per se* treatment is confirmed by the recent decision in *National Society of Professional Engineers* v. *United States*, *supra*. The agreement there, which expressly prohibited the submission of competing prices to customers, obviously "tampered with" and had an effect on prices. Under the Second Circuit's analysis, that should have led to application of a *per se* rule. But this Court chose instead a rule-of-reason approach under which it struck down the engineers' agreement as having "[o]n its face" an "anticompetitive purpose and effect," 46 U.S.L.W. at 4359. In contrast, the agreements in this case have no comparable purpose and, because they contain no prohibition against price competition, no comparable effect. Indeed, the Second Circuit assumed only that blanket licensing "dulls [the individual copyright owner's] incentive to compete," and that assumption was

contrary to the decision of the District Court specifically upholding blanket licensing after elaborate inquiry into its competitive impact.[9]

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

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[9] The District Court applied a rule-of-reason standard. 400 F. Supp. at 747; *see Columbia Broadcasting System, Inc.* v. *ASCAP*, 337 F. Supp. 394, 398 (S.D.N.Y. 1972).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether it is unlawful price-fixing under Section 1 of the Sherman Act for a nationwide group of otherwise competing sellers to agree to have a sales committee market their products at prices fixed by that committee.

2. Whether such conduct constitutes copyright misuse where the products in question consist of performance rights to copyrighted music.

The Court of Appeals for the Second Circuit answered both questions in the affirmative. For the reasons set forth below (principally that those rulings were clearly correct and fully in conformance with this Court's prior price-fixing decisions), we believe neither question requires or warrants the grant of these petitions. But if writs of *certiorari* were to be issued to review those questions, we would also urge, as additional grounds to support an affirmance, affirmative responses to the following questions which are germane to the totality of defendants' conduct and incorrectly decided by the district and circuit courts:

3. Whether the combination described above is guilty of monopolization under Section 2 of the Sherman Act where (a) the sole license the committee offers to users is a blanket license to the entire pool of its members' copyrighted musical compositions, under which the user pays a fixed dollar fee or a percentage of its income; (b) any attempt by a user to surmount the barriers to dealing directly with the members of the combination is a course of conduct that threatens the user with appreciable competitive disadvantage and loss; and (c) those barriers are artificial in the sense that they have arisen as a result of the existence of the combination and may be removed by court decree.

4. Whether the combination described above is guilty of tying under Section 1 of the Sherman Act and copyright misuse under this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, is quoted in the petitions. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides, in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . ."

STATEMENT OF THE CASE

A. Facts

Writers of musical compositions ordinarily assign the copyrights to their works to music publishing corporations, pursuant to contracts under which the publishers agree to promote and commercially exploit the songs and divide the royalties with the writers (Pet. A. 9a n.13*). In most fields of exploitation—such as the licensing of publishing rights to sheet music companies, mechanical rights to phonograph record companies, and performance rights to motion picture production companies—music publishing corporations deal directly with their customers (Pet. A. 67a-68a), and those markets are characterized by price competition

*"Pet. A." citations refer to pages of petitioners' appendices, which are identical.

among individual compositions and thus the publishers themselves.

The licensing of nondramatic performance rights to television networks, other broadcast users, and a wide variety of users making direct performances to the public (night clubs, skating rinks, etc.) is carried on collectively, without price competition, through the instrumentalities of ASCAP and BMI (Pet. A. 3a n.3).

Virtually all major music publishing corporations are members (through different subsidiaries) of both licensing organizations.* Since each writer is permitted to affiliate with only one, publishers need such dual memberships in order to attract writers of both camps.

As a condition of membership, each writer or publishing company must sign a standard (ASCAP or BMI) writer or publisher agreement. Under that agreement the member authorizes the organization to license all of his (its) musical compositions,** then existing or thereafter created, on the terms and conditions decided upon by the ASCAP or BMI Board (Pet. A. 26a-27a).

The total number of copyrighted musical compositions owned by current members and, therefore, the number of compositions in the ASCAP and BMI pools exceeds, respectively, three million and one million (Pet. A. 27a). The district court found that "[as] a practical matter virtually every domestic copyrighted composition . . . is in the repertory of ASCAP or BMI" (*id.*).

The only form of license that ASCAP and BMI affirmatively offer to users is a blanket license to the organization's entire pool (Pet. A. 6a-7a). (Under their respective consent decrees, each organization is also required, upon a broadcaster's request, to issue a blanket license under which the fee is paid on each program using

*It is a stipulated fact that "virtually all major ASCAP publishers own or are owned by corporations which are affiliates of BMI". Also, Edward Cramer, President of BMI, testified:

> "Most leading publishers have affiliation with both ASCAP and BMI: It is hard to think of one that doesn't have publishing interests in both camps." (Tr. 4282)

**Unless otherwise indicated, references to the licensing of music shall hereafter mean the licensing of nondramatic performance rights.

pooled music, rather than on an annual basis; but all commercial television networks and, with *de minimis* exceptions, all commercial television stations in the United States have held and now hold standard ASCAP and BMI blanket licenses (Pet. A. 7a n.9).)

The blanket licenses ASCAP and BMI offer television networks, including CBS, contain the following principal provisions:

> (a) The network receives the right to use the entire ASCAP (BMI) pool.
>
> (b) For that right, the network pays a flat fee or fixed percentage of its income, which fee does not vary in relation to the nature or quantity of the uses the network makes of ASCAP (BMI) music during the license term.
>
> (c) Moreover, that fee remains constant irrespective of any direct licenses obtained by the network or independent program production companies ("packagers") from ASCAP members—thus, for the network to obtain direct licenses would result in the network paying twice for the same rights. (Pet. A. 3a, 6a-7a)

All ASCAP and BMI revenues in excess of administrative expenses and deposits in certain funds are distributed to their members on essentially a per-use basis (Pet. A. 11a n.15). To determine the nature and frequency of uses for distribution purposes, ASCAP and BMI survey all network uses and sample the performances of other categories of users (Pet. A. 27a). ASCAP writers also have the option of receiving distributions under a four-fund plan, which has an effect of deferring part of their income and compensating them additionally for longevity of membership and the recognized status of their works (Pet. A. 11a n.15). Many BMI writers are given bonuses in addition to per-use distributions, as well as royalty guarantees.

B. Prior Proceedings Relevant to These Petitions

On January 20, 1972, the district court denied ASCAP's motion for summary judgment (337 F. Supp. 394), holding that there were material issues of fact to be tried with respect to whether ASCAP's activities, "which would otherwise be illegal *per se*" (*id.* at 400), could be justified on the ground that they were essential in order to permit the market (for the licensing of performance rights to television networks) to function.

By order dated June 12, 1972, the district court directed that the issues as to defendants' liability be tried separately from, and prior to, issues concerning the nature and extent of the relief to be granted herein.

After trial, the district court held, on the authority of single-seller tying and misuse decisions, that a nationwide combination of sellers (ASCAP or BMI) who market their product through a common-sales-agency device could not be found to have engaged in price-fixing, in the light of the sellers' "retained right" to deal directly at "negotiated price[s] for each license", unless it could be shown that they "compelled" their customers to accept the common-sales-agency fixed price (Pet. A. 114a-115a).

The court stated that it could find such "compulsion" to exist in this case only if CBS could prove that filling its music performance rights requirements by direct licensing (the so-called "bypass" of ASCAP and BMI) was "not a viable method" (Pet. A. 55a), in the sense that (a) publishers and writers would boycott CBS in the event it canceled its ASCAP and BMI blanket licenses, or (b) the transactional problems of direct licensing (given the present lack of direct-licensing facilities) were not surmountable in the absence of judicial relief (Pet. A. 46a-47a, 50a). The court found that CBS had not proven either proposition, and indicated that CBS would be unable to do so unless and until it attempted a bypass in lieu of accepting the common-sales-agency price, and "failed" in some measurable degree (Pet. A. 43a, 54a, 113a-114a).

The Court of Appeals reversed, holding that defendants fix prices in violation of Section 1 of the Sherman Act. The bases for that decision are reviewed below.

SUMMARY OF ARGUMENT

Since petitioners' requests for *certiorari* all stem from the supposed "uniqueness" and invalidity of the Court of Appeals' price-fixing determination, the short answer to these petitions is that any other determination, under the precedents established by this Court, would have constituted plain error.

Involved here is nothing less than the delegation by all sellers, to a central Committee, of the authority to fix prices on their products. It presents as clear a case of illegality under Section 1 as could possibly be conceived. Past excuses of market-functioning necessity are no longer espoused by petitioners; in fact, they affirmatively argued below that no such necessity exists, and the district court so found.

There is no relationship, let alone conflict, between the Ninth Circuit decision in *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on opinion below*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977) (that cooperative false advertising does not amount to a price-fixing offense) and the Second Circuit decision here (that collective selling at Committee-set prices is a *per se* violation). There is also no conflict in *result* between this decision and *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). Moreover, since the reasoning of *K-91* was self-evidently contradicted by its own findings of fact and subsequently discredited by the Solicitor General's brief on the *certiorari* petition, its conflict with the reasoning here is of no practical consequence, and it neither requires nor warrants resolution by this Court.

The only question of significance this case has ever presented concerns, not the illegality of defendants' con-

duct, which is flagrant, but the details of the remedy required to "effectively pry open to competition a market that has been closed by defendants' illegal restraints". *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947). Since that issue has not as yet been squarely presented to the lower courts, much less resolved, the matter is hardly ripe for review at this time.

Argument

POINT I

THE COURT OF APPEALS' DECISION THAT PETITIONERS FIX PRICES IS NOT ONLY CONSISTENT WITH, BUT MANDATED BY, PRIOR DECISIONS OF THIS COURT.

A. Petitioners Fix Prices.

If music publishing corporations agreed among themselves to sell performance rights to television networks for $1,000-a-use, they would obviously be engaged in a garden-variety price-fixing conspiracy.

If the same publishers appointed a Committee to make sales at $1,000-a-use, that, too, would be price-fixing "beyond peradventure", as this Court held in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 135 (1969).

Assume, then, that these publishers and their Committee noticed, after a period of years, that each television network was paying in the aggregate about $5 million a year (the sum of all those $1,000-a-use payments), and the Committee decided to change the system by charging each network an annual price of $5 million for unlimited uses (and to make distributions to its members at $1,000-a-use, or whatever). No one could sensibly claim that the publishers were not still fixing prices through their Committee.

The third example is, of course, the ASCAP and BMI system. It differs from the first two examples only in the fact that the publishers do not agree on a specific price to be charged the networks for each use but on a specific *formula*

for distributing a lump-sum price to themselves on a per-use basis. In neither case is the price determined by the dynamics of a free and open competitive market; it is determined by an agreement among otherwise competing sellers—and that, as the Court of Appeals held, is most assuredly a price-fixing agreement.*

The fact that a federal court is empowered by the 1950 ASCAP consent decree, *United States* v. *ASCAP* [1950-51] *Trade Cas.* (CCH) ¶ 62,595 (S.D.N.Y. 1950), to set a "reasonable" price for that consortium's package

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*As alternatively stated in Note, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*, 87 YALE L. J. 783, 793-94 (1978),

> "When a group of sellers vend their product through a joint sales agency at a single price, competition among the individual sellers ceases to exist. Market forces do not determine how much each seller is to receive for his product. Instead, the decision is made by the agent. ASCAP does not set the price for the licensing of single compositions as in simpler price-fixing schemes. But by offering a blanket license, it sets one price for all compositions, and price competition among members of ASCAP is eliminated as surely as if the rate for each performance were fixed at the outset. Copyright owners, much as patent owners, may not pool their properties in order to fix prices." (Footnotes omitted.)

We think it clear, by necessary implication, from *United States v. Loew's Inc.*, 371 U.S. 38 (1962), and *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and by square holding in *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F. 2d 515 (8th Cir. 1949), that the price-fixing of performance rights to copyrighted music constitutes copyright misuse—as the Court of Appeals held here (Pet. A. 23a n.29). *See also Tempo Music Inc.* v. *Myers*, 407 F. 2d 503 (4th Cir. 1969). Petitioners challenge the existence of the copyright misuse doctrine, yet this Court's initial adoption of the patent misuse rule was predicated on the authority of the copyright misuse concept. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942). Furthermore, the distinction petitioners claim between the supposed "economic clout" of copyrights and patents (BMI Pet. 23) is wholly beside the point, even if such a sweeping generalization were factually valid. For the misuse concept derives, not from the degree of the "clout" inherent in the statutory monopoly (patent or copyright), but from the *extension* of that monopoly inherent in the antitrust offense.

More significantly, however, for purposes of these petitions, the question is of such little consequence to this case (since the price-fixing determination supports the relief sought) that it plainly fails to provide an independent basis for the issuance of a writ and should be re-aired, if at all, in a case in which it is central.

neither dislodges the price fix nor is particularly pertinent to this case.*

The Sherman Act, as the Court of Appeals observed, says nothing about "reasonable" prices (Pet. A. 11a-12a). It is "aimed at preserving free and unfettered competition as the rule of trade". *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). What it guarantees are prices determined by "the unrestrained interaction of competitive forces" (*id.*); what it therefore prohibits is any combinative practice "which prevents the determination of those prices by free competition alone". *United States* v. *Socony-Vacuum Oil Co. Inc.*, 310 U.S. 150, 223 (1940).

Thus, whether otherwise competing sellers agree to sell at a price (a) set by an independent accounting firm authorized to hold hearings for the purpose, (b) established by a federal district court, or (c) pegged to the Dow-Jones Average (*e.g.*, 960 = $960-a-use), that price is still not determined by the dynamics of a competitive market—it is, therefore, noncompetitive and fixed.

All the court has the power to determine under the ASCAP decree is the price tag for the Committee's package—*i.e.*, how much each user will turn over to the consortium to be funneled back to the members through its distribution system. By so doing, the court by no means supplants—indeed, it implements—the members' price-fixing arrangement:

> "For a price fixed by a judge, no matter what his personal competence, is not a true reflection of competitive market forces. The price, no matter how reasonable, if determined on the imprimatur of a court, remains the product of non-competitive forces." Pet. A. 18a.

*Nor is it even applicable to BMI, whose consent decree contains no rate-making provisions.

The fact that music publishers were given the "right" by the 1950 ASCAP consent decree to sell directly to their customers (*i.e.*, not through the ASCAP consortium) and to charge other than consortium prices similarly fails to remove the price fix (even apart from the historical fact that they have never exercised such a "right").* All members of all price-fixing conspiracies *always* have such "freedom" in view of the unenforceability of price-fixing agreements—and the case books are filled with successful price-fixing prosecutions, including criminal convictions, in which the conspirators (unlike those here) actually and frequently exercised that "freedom". *E.g., United States v. Container Corp. of America*, 393 U.S. 333, 336-37 (1969); *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 488-89 (1950); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22 (1940); *Plymouth Dealers' Ass'n of Northern California v. United States*, 279 F.2d 128, 132 (9th Cir. 1960); *Ohio Valley Electric Corp. v. General Electric Co.*, 244 F. Supp. 914, 930-31 (S.D.N.Y. 1965).

*Nor, again, is such a "right" applicable to BMI, whose authority to license is exclusive. The BMI consent decree permits direct licensing of only "specified performances" made " directly to the public" (and upon written consent "of all writers and publishers" in interest). *United States v. BMI* [1966] *Trade Cas.* (CCH) ¶ 71,941, § IV (S.D.N.Y. 1966). If the phrase "directly to the public" were intended to include the electronic transmissions of telecasting equipment, there would have been no need for such a qualifying phrase, for in that event all performances would be deemed to be made "directly to the public".

The district court held that a stipulation concerning the "practicability" of directly licensing BMI music required an assumption for this case that BMI's rights were non-exclusive (Pet. A. 32a-33a). That ruling was erroneous, not only because it misconstrued the stipulation, but also because a stipulation of fact cannot alter a legal conclusion—*i.e.*, the exclusivity of the rights which BMI unquestionably obtains under its standard affiliation agreement. *Swift & Co. v. Hocking Valley Ry.*, 243 U.S. 281, 289 (1917). The ruling was also irrelevant to Section 1 (and therefore disregarded by the Court of Appeals), since the legality of price-fixing under the antitrust laws has never depended on the "exclusivity" or "nonexclusivity" with which prices have been fixed. In all events, whatever is said of ASCAP, applies, in reality, *a fortiori* to BMI, so we will generally refer hereafter only to ASCAP.

Plainly, such "freedom" does not somehow "unfix" the prices of Committee sales or otherwise make them competitive. As to those sales, price competition has not merely been restrained, it has been eliminated; and that is true whatever number of direct sales the participants in this combination might also transact. Indeed, that fact is dispositive of the liability question in this case. Hence, the Court of Appeals correctly held:

> ". . . [E]ven if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S. Ct. 811, 843, 84 L. Ed. 1129 (1940)." Pet. A. 12a.*

Even looking beyond that fact, as petitioners urge, though it is unnecessary in law to do so, it is evident that there is even less basis for assuming here, than there would be in a garden-variety price-fixing case, that the "individually negotiated" prices (which petitioners profess their willingness to offer, ASCAP Pet. 3, 13) would be equivalent to competitive prices (which the Sherman Act guarantees).

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*ASCAP allegedly finds comfort in this Court's restatement of the principle in *National Society of Professional Engineers v. United States*, 98 S. Ct. 1355 (1978), that only "plainly anticompetitive" acts are illegal *per se*. Since the price-fixing committed by ASCAP and its members represents the most "plainly anticompetitive" act on the ledger of antitrust offenses, the restatement of principles most pertinent to the present case is contained in the following passage of that opinion:

> "The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. . . . [Citations omitted.] That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason. . . ." 98 S. Ct. at 1364

In the first place, the very existence of a price-fixing arrangement "tends", as this Court noted in *United States v. Masonite Corp.*, 316 U.S. 265, 281 (1942), "to place a premium on the abandonment of competition"—a premium that buyers have to pay. Competitors do not conspire unless they recognize the value to themselves of entering into such agreements. To sell in a manner, or at a price, inconsistent with such an agreement threatens its viability and thus the loss of that value. Indeed, given such disincentive to compete where there exists only loose arrangements or understandings among sellers, tacit or express, consider the effect where the agreement consists of a highly structured consortium scheme that has insulated its members from price competition for nearly 65 years.

As the Court of Appeals observed:

> ". . . [T]he very availability of the blanket license itself involves the fixing of a collective price, which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete." Pet. A. 20a.

It "provides", the Court further stated, "a disinclination to compete" (Pet. A. 22a).

The ASCAP petitioners criticize what they term the "*ipse dixit*" of that conclusion (ASCAP Pet. 10); but their premise is confused. This is not a proposition which must be proven in order to show that competitors' agreements on price, arrived at in Committee, have an anticompetitive effect; it is an economically axiomatic point cited simply as further explanation why agreements of this nature are unlawful *per se*.

In *United States v. Masonite Corp.*, *supra*, the "right" of the colluding sellers to withdraw was recorded,

as it is here, on the face of the price-fixing agreement,* and the district court expressly found that the defendants

> "... were willing and intended to terminate their respective agency agreements whenever it should become commercially possible to offer a competitive non-infringing product." 316 U.S. at 281.

Precisely the proposition stated above was cited by this Court in explanation of why such a "right" and "intention" were irrelevant:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition. The extent to which that inducement in a given case will have or has had the desired effect is difficult, if not impossible, of measurement. The forces which that influence puts to work are subtle and incalculable. Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. . . . Control over prices thus becomes an actual or potential brake on competition. This kind of marketing device thus, actually or potentially,

*Since the agreement to fix prices was unenforceable, each competitor in reality had the right to withdraw at any time, although the termination provisions themselves required six months' notice. 316 U.S. at 272-73. In view of the Court's analysis of the case, a clause providing for immediate termination would have been no more material than the six-month termination provision; but it might be noted that the equally irrelevant "freedom" of the ASCAP publishers to withdraw could not be immediately effectuated either. For the district court here found that the creation of a direct licensing market, given the publishers' present lack of any direct-licensing facilities, would require "a long period of advance preparation" (Pet. A. 65a, 77a-78a).

> throttles or suppresses competing and non-infringing products and tends to place a premium on the abandonment of competition. It is outside our competence to inquire whether the result was or was not beneficient or whether the evil was or was not realized. As in case of an appraisal of the reasonableness of prices which are fixed, such a determination could satisfactorily be made 'only after a complete survey of our economic organization and a choice between rival philosophies' (*United States v. Trenton Potteries Co.*, *supra*, 273 U.S. at p. 398) and only after weighing a host of intangibles. *United States v. Socony-Vacuum Oil Co.*, *supra*. The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*. . . ." *Id.* at 281-82.

In the second place, the prices at which Committee sales are made would be reference points that would inevitably stabilize any "individually negotiated" prices.

ASCAP distributes approximately $1,000 ($500 to the publisher or publishers; $500 to the writer or writers) for each television network feature performance of an ASCAP composition (and correspondingly lower amounts for theme and background uses) (Pet. A. 11a n.15). From the standpoint of the copyright proprietors, their common-sales Committee, ASCAP, is effectively selling feature performance rights to television networks for $1,000 per use. So long as ASCAP continues to do so (at $1,000, $1,200, $800 or whatever that figure is) that fixed price and all the sales made at it would necessarily warp toward it, boost and stabilize prices in direct-licensing transactions. Any publisher from whom CBS were to solicit a direct-licensing price quotation would necessarily take into account the price at which he is selling to other networks through ASCAP and had been selling to CBS. It becomes a reference point or point of departure—*i.e.*, another determinant of price that does not arise from

competitive conditions, but is injected artificially into the market by an industry-wide sellers' agreement.*

Plymouth Dealers' Ass'n of Northern California v. United States, 279 F. 2d 128 (9th Cir. 1960), involved the stabilization effect inferred from the dealer association's circulation of a "list" price which was not even intended to be used as the dealers' actual sales prices (in fact, it was intentionally set high so as to give customers the impression of larger discounts off list). How much more obvious would that effect have been, and how plainly unlawful, had all automobile dealers in the country formed an industry-wide sales committee actually to make sales on behalf of its members at that list price.

*As observed in the Yale Note, *supra* at 793 n.64,

"It is difficult to conceive of circumstances under which the existence of an agreement to fix prices would not affect the price at which direct dealings would occur. In view of ASCAP's and BMI's domination of the market, the final price in any direct negotiation could hardly be the product of price competition, but would be influenced by the price fixed by ASCAP. *Cf.* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE at 164-73 (1970) (describing types of price leadership)."

This point, as was true of the first, involves a proposition of law, not a factual issue. But the record of this case is sufficiently copious actually to demonstrate, if not the magnitude of the effect, at least the inevitability of its occurrence. Among other concessions of this fact, Robert Nathan, ASCAP's own economic consultant on its distribution system and its economic expert witness at trial, testified:

"Q. Let's assume at this time the ASCAP distribution rate for feature music is $800 and lower fees for other categories.

"Do you think those fees would have any influence on prices arrived at, prices offered by publishers?

"A. Oh, I think it would be one factor. If I were a publisher and you represented producers of Columbia Television and you came to me, I think I would start putting numbers down and say, how much have I gotten in the past, try to figure out that average and think of something and then I think I would certainly use that as one of my factors in considering the bargaining price; one factor." (Tr. 4200-01)

BMI itself has again conceded the point in its very petition to this Court, where it states,

"To be sure, the price of a BMI license—like any other price in a market—has an effect on what would be charged in direct licensing transactions. . . ." BMI Pet. 15.

The difference, of course, between a BMI price (which is contrived by a cartel) and "any other price in the market" (which is charged by an individual seller) is all the difference in the world.

And consider what this Court's reaction would be to an industry-wide consortium of steel manufacturers who announced that their "Committee" would henceforth make sales at agreed-upon list prices for the "convenience" of their customers but that any customer who wished to attempt to bargain directly could do so.

The fact is that one cannot thrust down in the middle of what would otherwise be a competitive market an elaborate nationwide sales consortium scheme participated in by all sellers and expect that market to remain competitive—*i.e.*, expect prices still to be determined by the "unrestrained interaction of competitive forces", *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958), as required by the antitrust statutes.

Again, this impact need no more be proven when a price agreement is already afoot than the "premium" presumed in the *Masonite* decision; and it could not be measured even if direct licensing actually occurred. But it does not have to be assayed; the very problem of establishing such an impact empirically is one of the major reasons why arrangements of this nature are illegal *per se*. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n.59 (1940). As stated by the court of appeals in *Plymouth Dealers'*,

> "The very fact that this is extremely difficult of proof is probably one of the reasons why, in its wisdom, the Congress has seen fit to establish the law, and the Supreme Court to establish certain *per se* consequences of the proscribed action." 279 F.2d at 133.*

*The district court took no cognizance of this point or of the many striking judicial and testimonial admissions that reinforced it. Although the Court of Appeals stated, "On this record we are not convinced that this [stabilization effect] is necessarily so" (Pet. A. 22a n.27), it similarly did not refer to those admissions or to the precedent cited above, and advised the district court to fashion a remedy "which will ensure that the blanket license will not affect the price or negotiations for direct licenses" (Pet. A. 21a). We believe it clear, as stated above, that the point represents a legal conclusion, not an issue of fact, but, in any event, is icing on the cake to a holding of liability when otherwise competing sellers are already engaged in sales at Committee-set prices.

B. Petitioners' Central Contentions

As is true of their assertion that the possibility of "individually negotiated" prices is all the Sherman Act affords, all other reasons put forth by petitioners as to why they are not fixing prices simply reconfirm that they are.

1. Petitioners contend that the district court was correct in holding, on the authority of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), that sellers who price and market by Committee are not fixing prices unless they "coerce" their customers into purchasing from that Committee (ASCAP Pet. 14-15).

Zenith, however, was not a price-fixing suit; it condemned as patent misuse the insistence by a *single* owner of a group of patents that its licensees pay royalties on unpatented products. In that case, there would have been no abuse of patent leverage, and no anticompetitive effect, unless that single seller "coerced" licensees' acceptance of those terms or refused to license on any other basis.

Where, as here, copyrights are pooled by a multitude of otherwise competing sellers and licensed at prices fixed by their Committee, the combination achieves an anticompetitive effect regardless of any "coercion" exerted on the buyer to deal with the Committee; accordingly, as the Court of Appeals held, "coercion" is not an element of the offense (Pet. A. 17a).

To the ASCAP petitioners, that conclusion is anomalous, for, they say, they could convert themselves into a "single-seller" too by the simple expedient of "assigning their copyrights to ASCAP", and "surely", they contend, "it makes no sense, economic or legal, to penalize ASCAP's members" for not having done so (ASCAP Pet. 15).

What really "makes no sense" is that contention. If ASCAP acquired title to all of its members' 3,000,000 copyrights, it might not, arguably, be guilty of price-fixing under Section 1 of the Sherman Act when it licensed others to use those copyrights; but it would have committed a

blatant violation of Section 2 of the Sherman Act and, to the extent Section 7 of the Clayton Act applies to unincorporated associations, of that statute as well.*

2. *Amici* Copland, *et al.*, analogize ASCAP to a joint venture of music publishers and to a partnership of lawyers (Br. 11-15), whereas BMI prefers to be equated with a "wholesaler of eggs" (BMI Pet. 15). Precisely the same fallacy that undermines ASCAP's reliance on the single-seller cases (such as *Zenith*) shows the speciousness of these contentions.

If BMI were actually to acquire futures on all eggs now or hereafter to be produced in this country, it would doubtless be guilty of violating Sections 2 and 7; just as ASCAP would unquestionably violate Section 2, if it pooled titles to all its members' copyrights in a single joint venture, or engineered a partnership of all or most lawyers in the United States. When, on the other hand, publishers, law firms or any otherwise competing sellers authorize another entity to set prices on their behalf, the applicable offense is that prohibited by Section 1, whatever the legal form in which that entity is organized.

This is hardly an arbitrary or artificial distinction, as petitioners seem to imply; it is a distinction fundamental to the operation of the antitrust laws.**

3. The BMI petitioners advance the additional and curious contention that publishing corporations are not fixing prices through BMI because they have turned over the decision regarding prices to be charged to the BMI Board on which they are not represented and never themselves discuss or agree upon such prices.

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*By the same token, if all the banks in New York City were to merge, the resultant corporate entity would not be guilty of fixing interest rates on loans, but it would certainly be guilty of violating Sections 2 and 7.

**The failure to perceive it is also one of several major errors in reasoning discrediting the Harvard student work on which petitioners rely (Note, *The Middleman as Price Fixer*, 91 HARV. L. REV. 488 (1977)). Another is that collective licensing can be justified by transactional efficiencies—a notion dealt with below (at 22-23).

The basic misconception of this argument concerns what price-fixing is. Whether otherwise competing sellers have allowed the final decision regarding the prices to be charged to be made by a committee of the whole, a committee of elected representatives, a committee of independent third parties, or a totally external and arbitrary factor (*e.g.*, the temperature reading in Central Park), the arrangement constitutes price-fixing and is unlawful *per se* for exactly the same reason that any competitors' agreement regarding prices is unlawful *per se:* it prevents prices from being determined solely by "the unrestrained interaction of competitive forces" (*Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)).

As to both that point and the supposed "independence" with which BMI publishers delegate pricing authority to BMI, the following passage of the decision in *United States v. Masonite Corp.*, 316 U.S. 265, 275-76, (1942), applies *a fortiori:*

> "As this Court stated in the *Interstate Circuit* case (p. 227): 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.' . . . Nor can the fact that Masonite alone fixed the prices, and that the other appellees never consulted with Masonite concerning them, make the combination any the less illegal. Prices are fixed when they are agreed upon. *United States v. Socony-Vacuum Oil Co., supra,* p. 222. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action. . . ."

4. The BMI petitioners also cite *Standard Oil Co. (Indiana) v. United States,* 283 U.S. 163 (1931), *International Manufacturing Co. v. Landon, Inc.,* 336 F.2d 723, 729 (9th Cir. 1964), *cert. denied sub nom. Jacuzzi Bros., Inc. v. Landon, Inc.,* 379 U.S. 988 (1965), and related decisions in support of their assertion that the rule of reason governs "agreements among licensors of interlocking patents on a price for a license to all of the patents and on a formula for division of the proceeds" (BMI Pet. 19).

If either that proposition or the cases cited were of any utility to defendants on these petitions, one would have expected the ASCAP petitioners to have advanced the same point. They have not, and the reason is made evident by the very ground on which the Ninth Circuit in *Landon* both relied on the *Standard Oil* decision and distinguished that ruling from a case such as that presented here:

> "The pooling of the patents, licensing all patents in the pool collectively, and sharing royalties is not necessarily an antitrust violation. In a case involving blocking patents such an arrangement is the only reasonable method for making the invention available to the public. *Standard Oil Co. v. United States,* 283 U.S. 163, 170, 51 S. Ct. 421, 75 L. Ed. 926.
>
> "Appellants argue, however, that mandatory package licensing of all the patents in a pool constitutes patent misuse. Although there is no case precisely in point, appellants call our attention to *American Securit v. Shatterproof Glass Co.,* 3 Cir.,

268 F. 2d 769, in which it was held that mandatory package licensing of the patents in that case fell within the tying prohibitions of the anti-trust law.

> "*That case is different from the one before us in that it involved competing, rather than blocking, patents. In our opinion this distinction is an important one.*" 336 F.2d at 729. (Emphasis added.)

Thus, when A and B own blocking patents, A can neither use his patent without obtaining a license to B's, nor interest others in a license to use his patent without the authority to license others to use B's. B, of course, is in exactly the same boat. Hence, a market-functioning necessity exists for A and B to agree to allow each other to license the patents together; and that agreement is exempted by case law from the operation of Section 1, since it would otherwise be impossible to utilize or market those patents. Accordingly, the Ninth Circuit further held,

> "If we were to condemn mandatory package licensing of blocking patents as a patent misuse, an owner of a blocking patent complex would be compelled to license only a part of the patent complex. This would be true even though he knew full well that the licensee would be able to use the patents only by violating the remaining unlicensed patents." *Id.* at 730.

The concept of "blocking" or "interlocking" patents is, of course, entirely foreign to the copyright field. Thus, the market-functioning exemption afforded "blocking" patents has absolutely nothing to do with a pool of otherwise competing copyrights or, consequently, with these petitions.

5. Most certainly, no such exemption is invoked by the transactional efficiencies inherent in collective monitoring* and licensing; although this false notion permeates petitioners' submissions.

*I.e., the monitoring of users' performances for the purposes of auditing licensed uses and detecting infringements.

In the first place, monitoring can be performed collectively, and its cost savings fully achieved, in the absence of collective licensing. There is, indeed, no reason whatever why publishers who monitor together (through ASCAP or any organization formed for the purpose) must therefore also license together (through that organization or otherwise), and petitioners have not even argued, let alone offered proof, that those two functions are mutually dependent.

In the second place, collective licensing and the suppression of competition that goes with it are not justified in law by transactional efficiencies. *United States v. Line Material Co.*, 333 U.S. 287, 309-10 (1948); *see also, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 610-12 (1972); *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942). The transactional costs of selling and shopping reduced by such a system are precisely the sort normally incurred in a competitive market. If the cartelization of music publishing corporations were deemed warranted by such "efficiencies", we must also permit all-industry sales Committees for the otherwise competing producers of movies and books, or, for that matter, automobiles and steel, for such consortia could doubtless point to equivalent or even greater transactional savings.*

*It should be noted in this connection that the Yale Note premises its call for a legislative solution on two erroneous assumptions of fact.

The first erroneous assumption is that direct licensing by networks will substantially increase the cost of "monitoring performances" (87 YALE L. J. at 801). Since ASCAP's and BMI's present monitoring of television networks now consists of complete audits of every single network use—*i.e.*, the maximum amount of monitoring anyone could want—there should not, by definition, be any increase whatever.

The second error, inherent in the supposed desirability of saving the transactional costs of direct licensing itself, derives from the author's failure to make two important distinctions: (a) between the start-up costs of direct licensing, which will be appreciable (*e.g.*, publishers' hiring and training of personnel and contacting writers to obtain their consents to direct licensing, *see* Pet. A. 9a-10a) but hardly inordinate, and the continuing transactional expenses (which cannot be any greater per-transaction than those now incurred in the licensing of performance rights to movie companies); and (b) between such continuing transactional expenses and those normally incurred in a competitive market (which there is no reason to believe would be any lower at all, let alone so much lower as to warrant the legislative proposal made in the Note).

Amici Copland, *et al.*, seem to suggest that joint licensing is justified, not merely by transactional efficiencies, but by the inability of the market to function without it (Br. 13). Prior to this suit, that was, in fact, the ASCAP party line. Thus, ASCAP's general counsel for more than 40 years, Herman Finkelstein, testified before a special committee of the Judiciary Committee of the House of Representatives in 1956:

> "An organization like ASCAP or BMI or anybody else should not be permitted to combine in great numbers unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the non-dramatic performing rights because in all other fields the writer and the publisher can shift for themselves, and so can the user." *Monopoly Problems in Regulated Industries: Hearings Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 84th Cong., 2d Sess., Pt. 2, Vol. 2, 4471 (1956) (Statement of Herman Finkelstein).

That, too, was the sole ground on which the Solicitor General supported the "result" (not the reasoning) in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968)—a case in which the radio broadcaster counter-claimant had stipulated to the facts underlying ASCAP's market-functioning-necessity defense.* And that was also the basis on which both groups of defendants initially sought to defend this suit (*see, e.g.* 337 F. Supp. at 401 n.4).

But whatever the validity of that concept as a matter of law, and whatever its relevance to the licensing of radio stations and restaurants, petitioners conceded at trial, the district court found, and the Court of Appeals agreed that

*The stipulation is quoted in the district court's opinion on ASCAP's motion for summary judgment (337 F. Supp. at 400).

it had no application whatever to the licensing of television networks (Pet. A. 16a). Indeed, petitioners affirmatively asserted the *lack* of market-functioning necessity because the facts necessary to support such a contention—

> that the market for the licensing of television networks could not function at all on a direct-licensing basis,

are totally inconsistent with the facts that petitioners desired to prove in order to buttress their (legally nonexistent) bypass defense—

> that that market would function so well on a direct-licensing basis that CBS could fill its requirements, without disadvantage, by bypassing both common-licensing agencies.

There is no longer, therefore, the slightest question but that this market can feasibly be made as competitive as those involving the licensing of mechanical, sheet-music and motion picture performance rights if only the present cartel apparatus were removed.*

6. Having dropped their own claim of market-functioning necessity, petitioners now criticize the Court of Appeals' dictum regarding the possible appropriateness of such a rule in the rare case of genuine and absolute necessity.

*CBS not only agreed at trial that the market for the licensing of performance rights of television networks would function perfectly well in the absence of collective licensing, it adduced considerable evidence to reinforce that proposition. On the other hand, CBS also maintained, and, we believe, overwhelmingly established, that:

(a) significant barriers to direct licensing are now in place, consisting of:

(i) the strong incentive publishers have *not* to expend their own efforts and funds for the creation of sufficient direct-licensing facilities to enable a television network to bypass, and thereby threaten the viability of, the very cartel system that provides them with noncompetitive royalties and spares them transactional expense;

(ii) the premiums that any bypassing network would have to pay for "music-in-the-can" (*i.e.*, all copyrighted music already recorded in all theatrical motion pictures and television programs in existence); and

Such a case might well be presented by some fields of collective licensing, as the Solicitor General maintained in *K-91*. And it is difficult to explain the decisions in *United States v. St. Louis Terminal Association*, 224 U.S. 383 (1912), *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), *Associated Press v. United States*, 326 U.S. 1 (1945), or the blocking-patent cases without resort to a market-functioning rationale.

In a case whose outcome depends on a resolution of that question, the grant of *certiorari* might be provident. But given the district court's finding here and petitioners'

(iii) the sanctions that ASCAP imposes on users and members alike for engaging in direct-licensing transactions (*e.g.*, withholding the services of monitoring and reporting on network uses); *but*

(b) those barriers are entirely artificial, cartel-created obstacles readily removable by decree—*viz.*:

(i) as is true of all sellers in competitive markets, and true of these same music publishers in other fields, the publishers would create facilities for dealing directly with customers, once dealing by cartel were enjoined, since there would be no other way to do business;

(ii) the music-in-the-can problem could be alleviated by a per-use system (*see* p. 39-40 *infra*) or eliminated entirely by the forfeiture solution adopted in *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 900, 904-05 (S.D.N.Y. 1948) (two opinions), and the 1950 ASCAP consent decree, *U.S. v. ASCAP* [1950-51] Trade Cas. (CCH) ¶ 62,595, § IV(F) (S.D.N.Y. 1950); and

(iii) whether the publishers authorized ASCAP and BMI to continue collective monitoring of networks, or financed some new organization for that purpose out of their direct-licensing royalties, that function would be performed, if it were deemed desirable by the publishers to continue it.

Those propositions were pertinent to CBS's additional claims of monopolization, tying and *Zenith* misuse; and though legally superfluous to the central price-fixing averment, were erroneously put in issue on that claim by the trial court's pre-trial order.

We note these points only because of the apparent confusion below that CBS, by offering evidence of barriers to direct licensing, was somehow trying to prove the market-functioning-necessity case that defendants had abandoned. The source of that confusion was the district court's failure to perceive the distinction between (a) natural or inherent barriers to direct licensing (which, if they existed, would arguably support a market-functioning-necessity defense), and (b) artificial barriers removable by decree (which obviously support the need for the issuance of such an order). It was the latter that we established; the nonexistence of the former was agreed to by all parties to the case.

own concession as to the prospective functioning of the market on a direct-licensing basis, this is plainly not such a case.

7. The BMI petitioners imply that the Solicitor General's approval of the *K-91 result* extended to the Ninth Circuit's conclusion "that ASCAP's offer of a blanket license was not price fixing" (BMI Pet. 13).

In point of fact, the Solicitor General indicated quite clearly that, absent the market-functioning necessity which had been stipulated to in that case, the common-selling agency device operated by ASCAP would be illegal *per se*:

> "Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the relevant economic setting—here, the relationship between the business of recorded music and commercial broadcasting." (Memorandum for the United States as *Amicus Curiae* at 7-8)
>
> "If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. . . .
>
> "Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson v. Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. . . ." (*Id.* at 13)

8. *Amici* Copland, *et al.*, further contend that if the market cannot function on a direct-licensing basis for

users other than networks, then collective licensing must be permitted for those networks, for otherwise they would be given "preferred" treatment which "the law does not require" (Br. 14).

What the law requires, obviously, is that colluding sellers be made to compete—whether their collusion is directed at a single buyer, a single class of buyers or all buyers to whom they sell. If any treatment can be deemed "preferred" or special under the antitrust statutes, it is that only arguably accorded, and certainly strictly confined, to the minimum extent of collusive activity which is absolutely essential for market-functioning purposes. To expand that treatment so as to leave noncompetitive any marketplace that could otherwise *be* competitive would stand the Sherman Act on its head.

9. BMI claims that the blanket-licensing system, even if price-fixing, should be accorded rule-of-reason treatment because both ASCAP and BMI are required by their decrees to issue blanket licenses on users' requests.

Of course, given the policy stated by the Solicitor General's brief in *K-91*, both ASCAP and BMI could immediately relieve themselves of that "requirement" *vis-a-vis* any category of user for which they conceded the loss of their market-functioning excuse.

But the more fundamental answer is this: CBS was not a party to the agreements underlying those decrees, nor a party to the actions in which they were entered. And there is no more reason why a private claimant should be precluded from asserting a *per se* rule because of a consent decree to which he was not a party than there is any reason why a private claimant should be precluded by such a decree from bringing suit. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *United States v. Columbia Artists Management Inc.*, [1963] Trade Cas. (CCH) ¶ 70,955 (S.D.N.Y. 1963), *aff'd per curiam* 381 U.S. 348 (1965); *United States v. ASCAP (Shenandoah Valley Broadcasting Inc.)*, 331 F.2d 117 (2d. Cir.), *cert. denied*, 377 U.S. 997 (1964).

BMI invites analogy to *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), which involved a statute, not a consent decree. While the former is obviously binding on all citizens, the latter is, just as obviously, not.

10. ASCAP complains that "the Second Circuit's ruling casts a shadow over every common selling agency which establishes package prices" (ASCAP Pet. 16). Well it should, since it is difficult to imagine how any such arrangement could be lawful.

ASCAP asserts that CBS is itself a "common selling agent of advertising time" for the stations affiliated with its network, and "a common buying agent of programs for performance on those stations" (ASCAP Pet. 16). If those charges were true, and if there were actually some evidence in the record to support them, they would be patently irrelevant to the only issue involved in these petitions —whether *ASCAP and BMI* are price-fixing combinations. Nevertheless, they are neither evidenced nor accurate.

CBS buys programs and sells advertising for its own account. Not only does CBS *not* act as a common-sales agent of advertising, it is prohibited by FCC regulation from so acting (47 C.F.R. § 73.658). And CBS is no more a common-buying agent of programs for the account of its affiliated stations than Doubleday is a common-buying agent of manuscripts for the account of book stores throughout the United States.

11. ASCAP's final thrust is essentially the contention that CBS has too much bargaining power to permit it to deal directly with individual composers who may not "behave like economic man in negotiating prices for the performance of their music" (ASCAP Pet. 22)—a theme that pervades much of the district court's opinion.

The fact is that writers of music *now* relinquish the commercial exploitation of their works and the negotiation of prices (in the mechanical, sheet music and motion

picture fields) to music publishing corporations whose existence, function and size are not alluded to in petitioners' papers.

Apart from that elision, the point here seems to be that because CBS is a big company it must be excluded from the protection of the antitrust laws—made to deal in a jungle. But can it seriously be said that all CBS's suppliers are entitled to gang up on CBS so that in combination they are as large or larger? Such a rule would make a shambles of the antitrust laws; and it is plainly an untenable contention.

In point of fact, most major music publishing corporations belong to conglomerate families—many as large or larger than CBS. We have, for example, Warner Communications, Gulf & Western, MCA, Transamerica, Disney, Twentieth Century-Fox, Polydor (a Dutch conglomerate which controls Chappel Music, one of the ASCAP giants) and EMI, (an English conglomerate, which owns Capitol Records and Screen Gems). Even the independents, such as Shapiro, Bernstein, Morris, Schirmer and Gershwin have vast catalogs containing thousands of show tunes and movie compositions—*i.e.*, the "standard" works so vital to music programming.

Moreover, CBS, because it produces few of its own programs, will rarely be dealing with music publishing corporations at all. The universal practice in the television and movie industries is direct licensing (between the producer of the program or film and the supplier of rights), music performance rights for television programs being the sole exception. Hence, as a result of this case, packagers will negotiate direct licenses to music performance rights in the same manner they now negotiate with other suppliers for all other program elements.

The only available proof regarding the price levels of direct-licensing transactions comes from the movie rights field—and those prices are exceedingly high (ranging from approximately $800 to $15,000 per song). The movie companies that buy those rights have at least as much

bargaining power as the television producers who will buy the performance rights for network television programs. Indeed, they are precisely the same companies.*

POINT II

NO CONFLICT AMONG THE CIRCUITS WARRANTS THE GRANT OF *CERTIORARI* IN THIS CASE.

A. K-91

K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied* 389 U.S. 1045 (1968), was an action for copyright infringement brought by several ASCAP members against a radio broadcaster operating in the state of Washington. The broadcaster defended by asserting that ASCAP's price-fixing and commission of other antitrust violations constituted copyright misuse, as did ASCAP's failure to comply with a Washington statute

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*In a similarly unfounded attempt to arouse emotional appeal for its position, ASCAP suggests that CBS seeks to pay nothing to ASCAP members for music used since March 31, 1978 (ASCAP Pet. 11n). The contrary is true and ASCAP has good reason to know that.

It has been CBS's announced position from the outset of this suit that it wishes to pay for the music it uses, but on a basis different from the extortive system under which performance rights are now purveyed. For that reason, this suit was brought solely for injunctive and declaratory relief. Following the Court of Appeals adjudication, CBS exercised the right, expressly reserved in 1970 with ASCAP's consent, to terminate the interim blanket license which CBS had accepted only under protest. At the same time, CBS stated its willingness (despite the lack of any legal entitlement in ASCAP) to commit to pay in respect of this period on the same terms that the court imposes in its final decree, and even to make payments on account pending the completion of the relief stage of the case. ASCAP rejected that proposal, insisting that CBS continue payments on the pre-existing terms (derived from the very system declared to be illegal) or risk infringement litigation in the event *certiorari* were granted and the Court of Appeals reversed.

We have no quarrel (here pertinent) with ASCAP's apparent attempt to have it both ways (*viz.*, to expect a voluntary CBS payment in the event of a denial of *certiorari* or an affirmance, while preserving its option of bringing an infringement suit in the event of a reversal); but ASCAP's attempt, in the light of these facts, to cast CBS as the party seeking unfair advantage is both disingenuous and ironic.

requiring it to issue per-piece licenses and file a schedule of per-piece rates. The broadcaster also counterclaimed for treble damages and injunctive relief.

The trial court, in an unreported decision, held the copyrights infringed and the defenses and counterclaims insufficient. The Ninth Circuit affirmed.

If there is a market-functioning exception to the rule condemning price-fixing as illegal *per se,* that affirmance was mandated by the parties' stipulation to the following effect:

> "It would be commercially, practicably and virtually impossible for plaintiffs and other composers, authors and publishers to issue a separate license for each performance broadcast over broadcasting stations or to have their payment for such performances on the basis of each individual use." (Quoted in the district court's decision denying ASCAP summary judgment in this action, 337 F. Supp. at 400.)*

It was, indeed, on that ground that the district court (in its summary judgment opinion) distinguished the result in *K-91* from that indicated in the present case:

> "Thus, the parties in *K-91* agreed that no practical alternatives were available to per program and blanket licensing, and none was proposed—which is, of course, the antithesis of CBS' position, and which removed from issue in the *K-91* case the very issue here presented. . . ." *Id.* at 400.**

*The parties also stipulated that:

"It would be commercially, practicably and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations. . . ." 337 F. Supp. at 400.

**It is helpful to an understanding of the present case to appreciate the extent to which the district court reversed direction following its summary judgment decision. There, after quoting with approval the Solicitor General's discussion of a market-functioning exception to the *per se* rule as the basis for the present consent decree regulatory

And on that ground, which was adopted by the Court of Appeals and is consonant with the Solicitor General's analysis, there is no conflict in *result* between *K-91* and the decision here.

While there is certainly a conflict in the reasoning of the two decisions, it should not rise to the level of this Court's concern. Surely, not all conflicts do (*e.g.*, the Ninth Circuit rule on "attempt to monopolize", recently highlighted in *Greyhound Computer Corp.* v. *IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied* 98 S. Ct. 782 (1978),

system (as opposed to an injunction dismantling the ASCAP combination), and concluding that anticompetitive restraints could be tolerated only to the minimum extent necessary to serve "the purpose of maintaining an orderly market", the court held:

> "if CBS can prove that the regulatory system can be amended to operate on a more competitive basis [*i.e.*, permit competition to occur and still enable the market to function], it would by definition mean that the antitrust laws were being encroached upon more than to the 'minimum extent necessary'." *Id.*

There was notably absent from that decision any framing of an issue as to whether the publishers' "retained right" of direct licensing could be resorted to, or whether, if it could, it meant that the ASCAP combination was somehow not fixing prices. On the contrary, the court branded ASCAP's activities as "price fixing" which would "be illegal *per se*" but for the possibility of a market-functioning necessity *(id.)* and mentioned, in passing:

> ". . . we are doubtful *in any event* of the practical value of the 'nonexclusive right' under the present system. We are inclined to agree with the court in *Schwartz v. Broadcast Music, Inc.*, 180 F. Supp. 322, 333 (1959). There Judge Weinfeld observed as to the argument that a user always has the 'option' to seek an individual license: 'The nonexclusive right allegedly retained by the plaintiffs [composers and authors] is more apparent than real.' " *Id.* at 401.

By the time of the final opinion, however, the "key factual issue in the case" had become whether ASCAP's rights were effectively "exclusive" (in the sense of whether a bypass was impossible or would result in a boycott of CBS); neither Mr. Finkelstein nor any of his voluminous testimony admitting that point was ever mentioned; and while the court itself held on summary judgment that the critical issue was whether "the regulatory system can be amended to operate on a more competitive basis", it then stated, in its final opinion, that

> **"CBS *now* takes the position that the primary question presented for determination is whether the present system can be amended to operate on a more competitive basis." Pet. A. 39a. (Emphasis added.)**

which conflicts with the rule applied by every other circuit court of appeals in the country). At minimum, they should be of the sort that generates uncertainties having a widespread and significant effect on important areas of conduct.

Here, for at least three reasons, there can be no such effect.

First, the *K-91* reasoning is not simply wrong; it is self-evidently absurd. Despite the stipulation and undisturbed finding in that case that direct licensing "was virtually impossible", the court held that ASCAP does not fix prices because its members' rights to engage in direct licensing "are fully preserved" (372 F.2d at 4). Despite the fact that ASCAP members fix prices before contact with a user is made and certainly before the matter is brought to the federal court, the Ninth Circuit reasoned that the federal court, not ASCAP, is the "price-fixing authority" (*id.*). And despite this Court's repeated holdings that the reasonableness of collusive prices is irrelevant to the price-fixing offense, the Ninth Circuit held that the blanket license was protected by the presumptive reasonableness of available judicial price determinations (*id.*).

No one, we submit, could sensibly rely on the continued adoption of such reasoning.

Second, whatever tenuous optimism any publisher might have had regarding the viability of that reasoning prior to the *certiorari* petition, it should not realistically have survived the filing of the Solicitor General's brief. In that, the Department of Justice gave explicit warning that price-fixing by ASCAP would not be tolerated without a continuing market-functioning-necessity excuse. Since the Court of Appeals' decision in the present case is exactly to the same effect, it cannot disturb any rational reliance on the outcome of *K-91*.

Third, *K-91* concerned the licensing of one segment of the copyright bundle of rights (nondramatic performing

rights) to one class of users (radio stations); and this case concerns the same segment and a second user class. The ruling reached here is in complete conformity with all price-fixing decisions since *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). The only conduct it should disturb is conduct which is patently illegal and occurs in that narrow field. Indeed, the only way in which this case could have widespread adverse repercussions would be if the Second Circuit decision were reversed.

For a reversal here would effectively state to every industry in this country: although you cannot band together to fix prices in the traditional way, you can band together to form an industry-wide sales committee and do it that way; in fact, you will find it to be more effective.

B. Cook Paint

Petitioners support their claim of conflict between *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on opinion below*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977), and the Second Circuit decision in this case entirely on the supposition that otherwise competing sellers who market at prices set by committee are somehow not responsible for fixing the prices at which their committee sells.

Since that supposition is pretense, there is no relationship whatever, let alone conflict, between the *Cook Paint* decision that cooperative false advertising does not amount to a price-fixing offense and the decision here that collective selling at committee-set prices is a *per se* violation.

Quite recently in *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131 (E.D.N.Y. 1978), a dealer-manufacturer list price gimmick, functionally equivalent to the circulation of list prices in *Plymouth Dealers' Ass'n. of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960), was distinguished from *Cook Paint*, and held actionable

under Section 1, on grounds and on precedent (*Plymouth Dealers'* and *Socony-Vacuum*) that apply here *a fortiori.* For we are not dealing in this case with an agreement that is one step removed from an agreement on selling prices (as in *Socony-Vacuum* and *Plymouth Dealers'*); and we are certainly not dealing here with a category of consumer fraud whose influence on price, if any, is peripheral and indirect and whose commission, addressable by other laws, has not been conceived by any court to be within the purview of antitrust statutes.

We are dealing with an express, written agreement for the creation of a price-fixing mechanism as blatant and pervasive as any ever conceived. To say, as do petitioners, that this decision, holding that combination guilty of tampering with price, would convert consumer fraud into price-fixing on the same analysis is studiously to misread the opinion.

POINT III

THE COURT OF APPEALS' GUIDELINES FOR RELIEF PROPOSE A PER-USE METHOD OF LICENSING* WHICH IS (1) FAR LESS RESTRICTIVE THAN THE PRESENT SYSTEM, (2) CONSISTENT WITH THE COURT'S HOLDING ON LIABILITY, AND (3) NOT, IN ANY EVENT, A FINAL REMEDY THAT WARRANTS REVIEW.

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*The basic elements of the per-use system proposed by CBS as one alternative form of relief are as follows:

(a) CBS would be freed of the obligation to pay ASCAP or BMI for the use of compositions which had been licensed directly from copyright proprietors.

(b) The licenses issued by ASCAP and BMI to CBS would cover that portion of the ASCAP and BMI pools which CBS had designated.

(c) CBS would pay ASCAP or BMI a specified fee for each use of ASCAP or BMI music covered by that license and not licensed directly.

(d) The fee for each use would be paid in accordance with a schedule of fees providing for different payments depending upon the nature of the use (*e.g.*, feature, theme or background).

A. Petitioners' Contentions and Admissions

What has been throughout this case a dead give-away of the baselessness of defendants' contentions that they are not fixing prices has been their further contention that the per-use system (now tentatively approved by the Court of Appeals) would represent a "classic" case of price-fixing,* despite the real freedom of publishers to license

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(e) If the fee schedules could not be agreed upon by negotiations between the parties, they would be set by the court. Those schedules would be adjusted at periodic intervals, either by negotiation or by the court, to reflect prices arrived at in the market.

(f) In addition to the per-use fee payments, provision would be made for payments by CBS to ASCAP and BMI for the expense of administering the per-use licenses.

(g) Each ASCAP and BMI publisher would have the right to cancel ASCAP's or BMI's authorization to license CBS under the per-use license with respect to any or all of the compositions of which it is the copyright proprietor, and with respect to any or all of the uses which might be made of such compositions. That cancelation right could be exercised on reasonable notice or at periodic intervals (*e.g.*, quarterly). The cancelation would not be operative, however, with respect to music-in-the-can or the use of any music taped or filmed prior to the cancelation (and thus in reliance on an ASCAP or BMI license) even though the tape or film was broadcast subsequently). Such subsequent broadcast would, of course, be subject to payment of the fee specified in the per-use schedule. The cancelation could be revoked by a copyright proprietor at any time, thus restoring previously withdrawn music to the coverage of the per-use license.

(In the light of that withdrawal right, defendants' persistent contention that the per-use system would create a "ceiling" on direct-licensing prices is plainly wrong. Any music publishing corporation that desires to license any particular compositions at prices exceeding the per-use rate need only withdraw that composition from the per-use license. Obviously, the per-use rate could not be a "ceiling" for a composition to which the license does not apply.)

(h) New music would be added to the coverage of the per-use license as it entered the performed works index of ASCAP or BMI so long as the copyright proprietor had not exercised his cancelation right as to the composition.

*As BMI put it in its post-trial brief (at 120) and similarly argued in its brief to the Court of Appeals (at 10); or as ASCAP asserted below,

> "[W]e contend, in fact, that a per-use license would itself be a price-fixing scheme and a violation of the antitrust laws." (ASCAP's Memorandum Re Proposed Order on Rule 42(b) Motion, dated May 5, 1972 at 6).

(footnote continued on next page)

directly in such a system and despite the lack of "coercion".

Of course that is true, and for precisely the same reasons that the present system is price-fixing regardless of whether "coercion" is imposed. Not only would the per-use fees at which ASCAP and BMI would continue to license represent fixed prices but, as we emphasized to the courts below, those rates would inevitably boost and stabilize direct-licensing prices.

For defendants to have conceded, however, that they would be fixing prices in a per-use system is certainly to have conceded that they are now fixing prices.* On the other hand, in the unusual circumstances of this case, the per-use remedy provides a sensible and efficacious form of relief (even if it is not our preferred alternative).

Fully to appreciate that fact requires at least a brief description of alternatives.

B. Per-Use Licensing Compared to the Present System and to Its Complete Abolition

The most obvious alternative would be a straight injunction against defendants' continuing to fix prices through ASCAP and BMI or otherwise in their licensing of television networks (which would effectively oust ASCAP and BMI from the market, since neither can continue selling without fixing prices). But the following factors must be taken into account in considering that approach:

Petitioners and *amici* now try to hedge their bets by stating only that per-use licensing is price-fixing "if" blanket licensing is price-fixing (ASCAP Pet. 11-12; BMI Pet. 24 n. 20; Copland Br. 15-16).

*Equally, ASCAP's admission of the price-stabilization effect of per-use prices is an admission of how the present per-use distribution rates to its own members would stabilize prices in the event direct licensing were to occur in a bypass attempt:

> "The fact is, however, that the per-use rates to be set by the court would inevitably become the focal point around which any direct licensing transactions would take place. . . ." (ASCAP's "Comments on CBS' Latest Statement of the Elements of a Per-Use License", dated May 24, 1973 at 2)

1. Since performance rights have been licensed collectively since ASCAP's creation in 1914 (except for the direct licensing of motion picture production companies spurred by the decision in *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions)), there do not, as the district court found, presently exist adequate marketing facilities for the direct licensing of published music to television networks, so that all network needs could not be obtained by direct licensing "without a long period of advance preparation" (Pet. A. 63a-67a, 77a-78a). Indeed, the parties stipulated that publishers do not even have the " 'facilities or procedures' for processing [such] requests" (Pet. A. 61a). Hence, the effective date of the straight injunctive remedy would have to be deferred for a period sufficient to permit such facilities to be created.

2. Although the district court predicted that the publishers' music-in-the-can leverage *(see* note at 25-26, *supra)* would not be imposed to the extent of concerted "holdups" (Pet. A. 102a-105a), there cannot be any rational dispute that networks, lacking licenses to such music, would have to pay substantial premiums in excess of competitive prices in order to use the films and programs in which such music was recorded. The economists for both sides agreed; BMI's trial memorandum affirmatively asserted that the situation in the aggregate would be "intolerable" for a network (BMI Trial Memorandum at 36); and, really, the point is so self-evident economically that judicial notice of it may be taken as it was in *Alden-Rochelle, supra*, 80 F. Supp. at 904-05.

There are two possible solutions. In *Alden-Rochelle,* the court, noting the movie producers' position that a bare injunction against ASCAP's licensing of movie theaters would place the pro-

ducers "in an obviously impossible bargaining position" with respect to music-in-the-can, enjoined ASCAP and its members from ever enforcing their copyrights as to such performances (80 F. Supp. at 904-05)—*i.e.*, an effective forfeiture of those rights. The alternative is to have music-in-the-can licensed by ASCAP and BMI on a per-use basis.

3. If the latter alternative were adopted with respect to music-in-the-can, the per-use rates the court set for those uses would clearly have the same price-stabilization effect as the present system or the full per-use system. But the blunt fact is: the same would be true for a period of time if the straight injunctive remedy were adopted with the *Alden-Rochelle* solution for music-in-the-can—for there is simply no way to erase the historical fact that ASCAP (from the members' perspective) has been selling performance rights to television networks for approximately $1,000-a-use.

In short, the methods for removing the anticompetitive effects ingrained by cartels of long-standing duration and national scope are not nearly as readily discerned as the illegality of those systems.

In contrast, these points regarding the per-use remedy should be noted:

1. One clear advantage it has over the straight injunctive remedy is that it may be made immediately effective. Whatever performance rights were not initially obtainable directly from publishers (given their present lack of personnel and facilities to negotiate and handle direct-licensing transactions), would be available from the ASCAP and BMI pools at per-use rates.

2. Per-use licensing is far less restrictive than blanket licensing*. Under the latter system, no direct licensing at all can realistically occur since no blanket licensee needs two licenses (blanket and direct), requiring two payments, for the same music. In a per-use system, on the other hand, a network user can immediately commence direct licensing for some portion of its requirements (without paying twice for that privilege). Though the existence of per-use rates would stabilize direct-licensing prices, there would nevertheless be, even at the outset, some considerable price competition among copyrighted compositions, since each would be *separately* priced.

*And, it might be noted, contrary to the assumption of the Harvard Note (91 HARV. L. REV. at 494), it would not be appreciably more expensive to administer than the present system. Uncontested evidence at trial showed that the start-up cost for ASCAP would be $9,500; for BMI, $22,000; and for both, continuing incremental costs of a few hundred dollars a calendar quarter. The reason is obvious: since ASCAP and BMI have computer capability to distribute revenues on a per-use basis to their members, the extra computer programming required to convert per-use distribution statements into per-use bills would be trivial.

As noted above, the stabilization effect of the present ASCAP rates would persist for some period after the entry of a straight injunction. Since per-use rates could initially be set (and periodically adjusted) more nearly to reflect competitive market price equilibrium levels, per-use relief could, in this sense also, more quickly remedy past anticompetitive effects.

3. Given the actual occurrence of direct-licensing transactions, and given the realization by publishers (driven home by the very result in this case) that direct licensing was here to stay, sufficient incentive would, at long last, exist for those companies actually to create direct licensing facilities, which would itself enable the networks to obtain an increasing portion of their requirements by this means. That development should, in turn, prompt ASCAP's and BMI's withdrawal from the market,

in the same fashion that ASCAP ultimately withdrew from the movie rights field after the *Alden-Rochelle* decision prohibited ASCAP from licensing theaters and led to movie producers' licensing directly from publishers.* Indeed, if ASCAP and BMI did not withdraw at that time, the court, under retained jurisdiction, could fashion whatever further relief was then indicated.

In terms of overcoming the "disinclination" factor noted by the Court of Appeals (publishers' resistance to direct licensing stemming from their preference for blanket licensing), the per-use and the straight injunctive remedies would have equivalent effect. Since in either event the networks would not have blanket licenses and, given the holding here, could not realistically be expected to return to that system, the loss of that system to publishers would have already occurred; it could not, in the Court of Appeals' words, continue to "dull [their] incentive to compete".

In sum, the imposition of a per-use system would immediately and "effectively pry open" to some considerable measure of "competition a market that has been closed by defendants' illegal restraints";** provide a continuing, transitional means for licensing compositions separately until entirely adequate direct-licensing facilities could be installed; spur the creation of those facilities; and thus, on the whole, afford sensible interim relief until the market could be made fully competitive. While the Court of Appeals did not articulate all those reasons for the guidelines it issued to the district court, the points are evident and the result, sound.

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*According to the Yale Note, *supra* at 801 n.104, "The projected process would be a classic example of market forces acting to break down cartel discipline [citing G. STIGLER, THE ORGANIZATION OF INDUSTRY 42-45 n.68 (1968)]".

**_International Salt Co. v. United States_, 332 U.S. 392, 401 (1947).

More importantly, however, for present purposes the Circuit Court's guidance to the court below does not present an issue worthy of *certiorari*. The adoption of a per-use system would have no application to other industries; it is *sui generis* to this case. Also, given the bifurcated nature of the suit, the issue of relief has not yet been squarely presented to either the district court or the Court of Appeals, let alone fully resolved. There obviously remains a trial on relief and, quite possibly, a subsequent Court of Appeals' determination, so that this matter is hardly ripe for present review.

What is clear (and, indeed, effectively conceded) is that defendants fix prices; the precise details of remedying that restraint should be left to the normal lower court processes.

CONCLUSION

For the foregoing reasons, these petitions for writs of *certiorari* should be denied.

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Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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REPLY BRIEF FOR PETITIONERS

I.

Every governmental body which has looked carefully at the facts in recent years has concluded that blanket licensing is a reasonable and lawful response to the unique problems of licensing music performance rights:

> (1) The Department of Justice, in consent decrees approved by the United States District Court for the Southern District of New York, required that ASCAP and BMI offer blanket licenses (*United States* v. *ASCAP*, [1950-1951] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950); *United States* v *BMI*, [1966] Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966));
>
> (2) The United States Court of Appeals for the Ninth Circuit held, in a suit involving a broadcaster, that blanket licensing does not unreasonably restrain

trade (*K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968));

(3) The Solicitor General of the United States told this Court in a brief *amicus curiae* on the petition for certiorari in *K-91, supra*, that blanket licensing did not unreasonably restrain trade;

(4) The Congress approved blanket licensing in enacting the new Copyright Act (17 U.S.C. §§ 111, 116);

(5) The Register of Copyrights recommended to Congress that performance rights in sound recordings be created and licensed on a blanket basis (43 Fed. Reg. 12,763, 12,767 (1978));

(6) The Copyright Royalty Tribunal recently found blanket licensing to be "the most suitable method for licensing public broadcasting to perform musical works." (43 Fed. Reg. 25,068, 25,069 (1978));

(7) Finally, the District Court here concluded, after an exhaustive analysis of an extensive record, that blanket licensing imposed no unreasonable restraint of trade (A.24a-121a).

Only the Second Circuit—which refused to look at the facts—has come to a contrary conclusion. Indeed, on the petitions for rehearing, Judge Moore, who had earlier noted his disagreement with the majority's price fixing ruling, stated that the evidence did not support the majority's suppositions. (A.23a, 125a.) Without looking at the facts, the Second Circuit has held unlawful a form of licensing which has been relied upon by composers, publishers and users of music throughout the world for more than forty years.

CBS' attempt to defend the Second Circuit's failure to consider the realities of the market place is nothing more than a lengthy exercise in name-calling. Repeatedly calling someone a "price fixer" does not make it so; the uncontroverted facts of record show clearly that BMI and its affiliates do no price fixing whatsoever.

In its single brief in response to the separate petitions of BMI and ASCAP, CBS has once again sought to obscure the material differences between the two performing rights organizations. In lumping it together with ASCAP, CBS has once again described BMI in terms which simply have no application to it. BMI is not "a nationwide combination of sellers"; it is not run by a "central Committee" for "otherwise competing sellers"; it has no "membership"; its prices are not the result of "otherwise competing sellers" agreeing "to sell at a price"; and its repertory was not "pooled by a multitude of otherwise competing sellers." (CBS Brief, 4, 6, 7, 9, 10, 18.) BMI is an independent middleman in which writers and publishers play no management role. BMI's pricing decisions are BMI's alone; writers and publishers play no part in them. Prior to the decision of the Second Circuit, no case had ever held that conduct of the kind engaged in by BMI and its affiliates is price fixing.

II.

CBS' characterization of the Second Circuit's ruling on copyright misuse as one which is "of . . . little consequence to this case" and one which "plainly fails to provide an independent basis" for review by this Court could hardly be more inaccurate. (CBS Brief, 9n.) In fact, many millions of dollars in license fee revenues and the very

existence of the performing rights organizations are placed in doubt as a direct consequence of this ruling:

1. BMI has sued CBS for $4,917,508 in license fees due under the license in effect prior to the commencement of this litigation (*Broadcast Music, Inc.* v. *CBS Inc.*, No. 573/1975 (N.Y. Sup. Ct. N.Y. Cty.)). CBS has pleaded copyright misuse as a defense and has moved for summary judgment on that ground.

2. During the pendency of this litigation, CBS has paid BMI under a court order under which either party may move for retroactive adjustment of the fee to reflect the determination of the case on the merits. CBS has paid BMI more than $13 million over the past nine years on such terms. If CBS had paid at the rate voluntarily agreed to by another television network, it would have paid BMI more than $22 million.

3. While the Second Circuit may have assumed that its copyright misuse ruling—a single sentence contained in a footnote—was applicable only to television networks, the misuse defense, as it has developed in the patent field, may be relied on by any user, even if it is not a target of the misuse. The Second Circuit's misuse ruling is already having a significant effect on BMI in negotiations with licensees and in copyright suits against infringers. The potential result of increasing resort to the misuse doctrine by music users is clear: the destruction of the music licensing organizations well before any proceedings on "relief" in this case are completed.

This is not just another case in one field of business; it is *the* case. The more than 33,000 writers affiliated with BMI, the 16,000 writers who are members of ASCAP, and the thousands of writers associated with foreign performing rights organizations (whose works are made available in this country through BMI or ASCAP) include nearly all the professional composers in the world. The livelihoods of the members of an entire profession are at stake on this petition.

August 11, 1978

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS BROADCAST MUSIC, INC., *et al.*

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In the

Supreme Court of the United States

October Term, 1978

No. 77-1578

Broadcast Music, Inc., *et al.*,

Petitioners,

v.

Columbia Broadcasting System, Inc., *et al.*,

Respondents.

No. 77-1583

American Society of Composers, Authors and Publishers, *et al.*,

Petitioners,

v.

Columbia Broadcasting System, Inc., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS BROADCAST MUSIC, INC., *et al.*

OPINIONS BELOW

The majority and separate opinions of the court of appeals are reported at 562 F.2d 130. (Pet. App. 1a, 23a.)[1]

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[1] References to "Pet. App." are to pages of the separate appendix to the petition for a writ of certiorari filed by petitioners Broadcast Music, Inc. ("BMI"), et al. References to "A." are to volumes and pages of the appendix to the briefs filed pursuant to the Court's order of November 6, 1978.

Upon the denial of petitions for rehearing, Judge Moore issued an opinion which is unreported. (Pet. App. 125a.) The opinion of the district court dismissing the complaint after a full trial on the liability issues is reported at 400 F. Supp. 737. (Pet. App. 24a.)

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1977. (Pet. App. 122a.) Timely petitions for rehearing and suggestions for rehearing in banc were denied on December 6, 1977. (Pet. App. 124a.) On February 17, 1978, and March 1, 1978, Mr. Justice Marshall extended the time to file the petitions until May 5, 1978, and petitions for certiorari were filed on that date by two groups of petitioners. On October 2, 1978, this Court granted the petitions and ordered that the cases be consolidated. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides, in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ."

QUESTIONS PRESENTED

A television network desiring to perform any musical composition in the BMI repertory may obtain a performance license from the individual copyright owner, who would willingly negotiate with the network. The questions presented are:

1. Whether it is per se unlawful price fixing under the Sherman Act for BMI, an independent middleman, to offer to users the alternative of a blanket license to perform all of the music in the BMI repertory?

2. Whether it is misuse for a copyright owner, as an alternative to direct licensing, to allow BMI, an independent middleman, to license his music?

STATEMENT OF THE CASE

1. The Parties

Petitioner BMI, a defendant below, is a corporation organized to offer licenses to users of music who make nondramatic public performances of copyrighted music. BMI has negotiated agreements with more than 33,000 composers and authors[2] of music and more than 16,000 music publishing companies permitting BMI to offer licenses to perform their works. These writers and publishers are

[2] We will often use the term "writers" to include both composers of music and authors of lyrics.

commonly referred to as BMI "affiliates." Several writer and publisher affiliates of BMI [3] were named in the complaint as representatives of a defendant class of BMI affiliates and are petitioners here.

Petitioner American Society of Composers, Authors and Publishers ("ASCAP"), also a defendant below, is a membership organization of writers and publishers of music which was founded in 1914. ASCAP's membership consists of approximately 16,000 writers and 6,000 publishers. Several writer and publisher members of ASCAP were named in the complaint as representatives of a defendant class of ASCAP members and are likewise petitioners here. (1 A. JA19.)

Respondent Columbia Broadcasting System, Inc. ("CBS"), the plaintiff below, is perhaps the principal user of music in the world. As the owner of one of the three national television networks, CBS purchases or produces television programs which it supplies to the five major television stations it owns and the approximately 200 television stations which are affiliated with CBS. CBS also owns and operates fourteen radio stations, one of the four national radio networks, and the world's largest record company. In addition to its activities as a licensee of music, CBS is a significant licensor of music. CBS owns several substantial music publishing companies, each of which is a member of ASCAP or an affiliate of BMI. (Pet. App. 27a-28a, 57a-58a, 90a, 93a.)

[3] Paul Anka, Jerry Bock, Fred Ebb, Norman Gimbel, Sheldon Harnick, John Kander, Charles Koppelman, Don Rubin, Joseph Stein, Al Gallico Music Corp., Associated Music Publishers, Inc., Duchess Music Corp., Edward B. Marks Music Corp., Hill and Range Songs, Inc., Hollis Music, Inc., Maclen Music, Inc., Peer International Corp., Screen Gems-Columbia Music, Inc., Sunbeam Music, Inc. and Unart Music Corp.

2. BMI's Organization and Operation

BMI was organized in 1939 by CBS and a number of other broadcasters to provide competition to ASCAP in bulk music licensing and to provide a licensing outlet for writers of forms of music such as country and blues, to which ASCAP was not then receptive. CBS disposed of its BMI stock in 1959; all of the approximately 485 holders of BMI stock today are local broadcasters or their successors. BMI pays no dividends to stockholders; all of its revenues after expenses and reserves are paid out to writers and publishers. (Pet. App. 2a, 27a; 15 A. 4247-48.)

Writers and publishers affiliated with BMI have no ownership interest in BMI. They do not sit on BMI's Board of Directors or its Executive Committee. They exercise no control whatever over BMI's prices or policies. (Pet. App. 2a, 27a; 15 A. 4247-49.)

BMI is a classic middleman. It acquires from many writers and publishers rights to grant licenses to their music and offers users licenses in bulk, providing them with an alternative to direct negotiation for public performance rights with the individual owners of the music.

a. BMI's Contracts With Writers and Publishers

Each BMI writer or publisher affiliate has entered into an agreement with BMI giving BMI a right to issue copyright licenses to music users to publicly perform the affiliate's works.[4] (*E.g.*, Plaintiff's Exhibit ("PX") 471A, 21 A. E578, 15 A. 4300; PX 472, 21 A. E588, 15 A. 4294-95.)

Generally, the affiliation agreements provide for payments to the affiliate in accordance with BMI's published payment schedules as they exist or come into effect during

[4] The agreement covers not only existing works but also works created or acquired during the term of the agreement. (21 A. E578 at ¶ SECOND, 15 A. 4300; 21 A. E588 at ¶ 1, 15 A. 4294-95.)

the course of the agreement. However, the agreements are subject to individual negotiation, and a number of them provide for payments of advances, guarantees, or bonuses in various amounts. (PX 451, 11 A. 3146-48; PX 452, 11 A. 3146-48; PX 453, 11 A. 3146-48; 3 A. 263; 13 A. 3816-20; 15 A. 4327-31, 4352.)

The payment schedules, which are modified frequently by BMI, generally provide for payments based on number of performances as determined by a census of television network performances and a sampling of performances by other broadcast licensees. However, the rate of payment may vary depending on such factors as the nature of the use (*e.g.*, a feature song, a program theme, or background music), the time of day, the nature of the user (*e.g.*, local radio station or television network), the number of past performances of the work, and the overall number of performances of that affiliate's works. The payment schedules are subject to change by BMI at any time without the consent of its affiliates. (*E.g.*, PX 469, 21 A. E564, 15 A. 4346; PX 470, 21 A. E571, 15 A. 4346; 15 A. 4255a-56.)

Payments to affiliates bear no direct relationship to the amount which BMI receives from any particular licensee. (PX 484, 12 A. 3570-71; 15 A. 4327.) Indeed, in a given year BMI may pay out more with respect to performances than it takes in. (PX 531, 12 A. 3549.)

While each BMI affiliate has authorized BMI to license music users who prefer to deal in bulk, each affiliate remains free to issue licenses for the performance of his compositions to music users who prefer to deal directly with copyright owners. Paragraph IV(A) of the consent decree entered in *United States* v. *Broadcast Music, Inc.*, [1966] Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966) (the "BMI Decree"), requires that BMI permit its affiliated writers and publishers to issue performance licenses directly to music users.[5] (Pet. App. 43a; BMI Exhibit ("BX") 114, 24 A. E1569, 16 A. 4681-87; 15 A. 4348-49.) The court of appeals affirmed the district court's finding that BMI's affiliates can, and would if CBS asked, negotiate and issue performance licenses directly to CBS. (Pet. App. 8a-10a, 111a-120a.)

b. *BMI's Licenses With Music Users*

By drawing upon the rights granted to it under its various affiliation agreements, BMI can offer to music users a single license which covers all the works of all its affiliates. This group of more than one million compositions is generally referred to as the "BMI repertory."

The most popular form of license BMI offers to broadcasters is the "blanket" license, which authorizes the user to perform any work in the BMI repertory, without advance notice to either BMI or the copyright owner, any number of times during the term of the license.[6] In return, BMI receives a fee which may be either a flat dollar amount or a percentage of specified kinds of receipts of the licensee. (*E.g.*, ASCAP Exhibit ("AX") 126, 22 A. E889, 15 A. 4497-98; Pet. App. 3a, 6a, 26a.)

BMI also offers broadcasters, pursuant to paragraph VIII(B) of the BMI Decree, a "per program" (or "per programming period") license. (24 A. E1574, 16 A. 4681-

[5] The current consent decree was entered into after a suit was commenced by the Department of Justice in 1964 alleging that BMI and its broadcaster-stockholders had attempted to monopolize the business of granting public performance licenses to broadcasters. BMI had been operating under a prior consent decree since 1941. *United States* v. *Broadcast Music, Inc.*, [1941-1943 Transfer Binder] TRADE REG. REP. (CCH) ¶ 52,516 (E.D. Wis. 1941).

[6] Blanket licensees also obtain the right to perform the works of the foreign writers whose works are available through BMI under reciprocal licensing arrangements with foreign performing rights organizations.

87.) This license is a form of blanket license in that the broadcaster receives unlimited access to the entire BMI repertory; however, a license fee is payable only with respect to programs (or programming periods) during which BMI music is actually performed. (Pet. App. 6a-7a, 32a.) The BMI Decree requires that the fee differential between blanket and per program licenses be "justifiable by applicable business factors." (Pet. App. 32a; 24 A. E1574, 16 A. 4681-87.)

Writers and publishers play no role in determining the price BMI will charge for a license. The fee for a BMI license is exclusively a matter for negotiation between BMI and the music user.[7] (Pet. App. 115a.)

3. Prior Proceedings

a. Background

When CBS filed this action attacking blanket licensing on December 31, 1969, CBS had held blanket licenses from BMI and ASCAP for its television network for 23 years. In all of this period, CBS had never sought a per program license for its television network,[8] nor had it ever sought public performance rights directly from ASCAP members or BMI affiliates.[9] (Pet. App. 2a, 27a-28a, 50a-54a, 62a-63a, 73a, 109a-111a; AX 126, 22 A. E889, 15 A. 4497-98; AX 127, 22 A. E908, 15 A. 4497-98.)

This lawsuit was commenced after negotiations between BMI and CBS collapsed over the amount of fees CBS was

[7] Since BMI is prohibited by the BMI Decree from discriminating between users similarly situated (¶ VIII(A)), in practice BMI often negotiates on license terms with industry groups of users. (24 A. E1574, 16 A. 4681-87; 15 A. 4254-55.)

[8] At the time of suit, CBS had held a per program license for its radio network since 1959. (BX 101, 15 A. 4253-54.)

[9] Indeed, when it led the group which founded BMI, CBS caused BMI to issue blanket licenses.

willing to pay for a blanket license. During the discussions, CBS never sought anything but a blanket license. BMI sought increased fees to reflect CBS' increased use of music in the BMI repertory. When negotiations proved unsuccessful, BMI gave the contractual 60 days' notice of termination of the blanket license. (Pet. App. 51a-54a.) As has unfortunately become all too common, CBS responded to a business problem not with a business answer but with a lawsuit.[10] (Pet. App. 112a.)

b. Proceedings in the District Court

Ironically, CBS, which had refused to pay BMI for its increased usage of the BMI repertory, complained to the district court that its blanket license fees did not vary with the amount of music it used. CBS alleged that BMI and its affiliates and ASCAP and its members had violated Sections 1 and 2 of the Sherman Act by compelling CBS to take blanket licenses and requiring CBS to "pay royalties on a basis which does not bear any relationship to the

[10] This is an excellent example of use of the litigation process itself to gain business objectives so that the litigant is benefited even if it loses the suit. Under color of its antitrust complaint, CBS refused to pay BMI or BMI affiliates anything at all for use of music in the BMI repertory. When BMI sought injunctive relief, CBS was required to pay only at the 1969 rate (subject to adjustment at the end of the case) which BMI had rejected as inadequate. By this tactic alone, CBS has thus far been able to pay BMI nearly $6 million less than another network has paid during the period of this suit. Furthermore, by pleading its antitrust complaint in the form of a misuse defense, CBS has prevented trial of a state court suit by BMI for the period prior to 1970 in which BMI seeks nearly $5 million, exclusive of interest, under the licensing agreement then in effect. After the district court dismissed CBS' complaint, but before the court of appeals' reversal, Judge Lasker enjoined CBS from relitigating the misuse claims in the state court, stating that CBS' suggestion that further delay would not injure BMI was "fanciful." *See Broadcast Music, Inc.* v. *CBS Inc.*, 424 F. Supp. 799 (S.D.N.Y. 1976). *See also Federal Judge Assails CBS on Delay Tactic*, N.Y. Law Journal, December 13, 1976, at 1, col. 4.

amount of music performed." CBS alleged that it would be "wholly impracticable" for it to acquire an adequate supply of performance rights directly from copyright owners. CBS demanded injunctive relief requiring that BMI and ASCAP grant CBS what it termed "per-use" licenses[11] and a declaratory judgment that the copyrights on the compositions in the BMI and ASCAP repertories had been misused and were unenforceable against CBS. (Pet. App. 33a; 1 A. JA25, JA28-29.) CBS' demand for injunctive relief was later modified to include a request, as an alternative to a per use license, for an order forbidding BMI and ASCAP to offer blanket licenses to any television network. (Pet. App. 3a, 25a.)

Following three years of discovery, a 29-day trial on issues of liability was held before Judge Morris E. Lasker of the Southern District of New York. On September 22, 1975, Judge Lasker filed a lengthy and careful opinion rejecting CBS' theories of fact and law. (Pet. App. 24a-121a.) Judge Lasker "painstakingly" (Pet. App. 2a) reviewed the extensive record[12] and concluded that the offering of blanket licenses by BMI and ASCAP did not unreasonably restrain trade and did not violate the antitrust or copyright laws. (Pet. App. 114a-120a.) CBS had failed to prove that defendants had placed any artificial price or supply restrictions upon the ability of CBS to acquire performance rights directly from copyright owners at competitive market prices. (Pet. App. 43a, 112a, 115a, 117a, 118a, 120a.) CBS

[11] Over the course of the litigation, CBS modified its definition of a per use license on numerous occasions, but it remains a bizarre concoction under which a copyright holder would not only be required to bid against himself, but also would be restricted to ever-lowering court-fixed ceiling prices. (Pet. App. 38a n.7.) The per use license is described in more detail at pp. 30-32, *infra*.

[12] The record consisted of the testimony of thirty witnesses (filling nearly five thousand pages of transcript), portions of twenty-four depositions and more than five hundred exhibits.

had failed to prove that defendants had combined or conspired to compel CBS to take blanket licenses from either BMI or ASCAP. (Pet. App. 114a-117a.)

The district court analyzed the market for performing rights:

> "Because of the multitude of performances of music they generate each year, virtually all radio stations and television networks secure the rights to perform the music they use by a 'blanket' license. An ASCAP blanket license gives the user the right to perform all of the compositions owned by its members as often as the user desires for a stated term, usually a year. Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is 'automatically' covered by the blanket license."

(Pet. App. 26a.)

The court's conclusion that CBS was not compelled to accept blanket licenses, but instead could rely on direct licenses, was based on extensive findings as to the nature and origin of the music used on network television. Most of the music performed on CBS' television network programs is composed especially for those programs by persons hired by the program producer expressly for that purpose. CBS could readily obtain direct licenses for performance rights to that music. As to other music used, CBS would have no particular difficulty in seeking out and negotiating with the copyright owners. CBS program producers al-

ready acquire synchronization rights[13] from all of the owners of the music used on the network. (Pet. App. 66a.) Should CBS ever decide to forego supplying its needs through BMI and ASCAP blanket licenses, it would be able to obtain licenses directly. (Pet. App. 28a, 56a-61a, 63a, 69a-79a, 111a-112a.) And if for any program direct licenses could not be negotiated or were not desired, a BMI or ASCAP per program license, requiring payment of a license fee with respect to that program only, would be available. (Pet. App. 109a-111a.)

The district court rejected CBS' claims that the continued offering of blanket licenses by BMI and ASCAP would have an anticompetitive effect on any price negotiations CBS might seek to conduct with individual copyright owners. (Pet. App. 115a-120a.) Judge Lasker found that:

> "CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them."

(Pet. App. 115a.)

> "CBS has failed to prove either that it purchased blanket licenses under compulsion or that the price it paid was fixed. To the contrary, the record establishes that CBS has always negotiated the price for its licenses with ASCAP and BMI. Moreover, CBS has not established that the individual defendants are unwilling to sell performance rights on a direct licensing basis at a negotiated price for each license."

(Pet. App. 115a; footnote omitted.)

> "CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. We have found that copyright proprietors would deal readily on a price basis; certainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place."

(Pet. App. 119a-120a.)[14]

[13] Synchronization rights are rights to record music in synchronization with film or videotape. (Pet. App. 67a.)

c. Proceedings in the Court of Appeals

CBS' appeal was heard by Circuit Judge Gurfein and Senior Circuit Judges Moore and Anderson[15] of the Court of Appeals for the Second Circuit on October 14, 1976.

On August 8, 1977, the Second Circuit reversed the district court in part. (Pet. App. 1a-23a, 122a-123a.) While the court of appeals affirmed the dismissal of most of CBS' antitrust claims[16] and did not disturb any of the extensive findings of fact made by the district court, Judges Gurfein and Anderson joined in ruling that, "with respect to the television networks," the offering of blanket licenses by BMI and ASCAP constituted per se unlawful price fixing.[17]

[14] The district court also found that CBS had failed to prove any threat of loss or damage sufficient to justify the issuance of the injunctive relief requested even if it were assumed, "contrary to the evidence," that CBS had proved a violation of the antitrust laws. (Pet. App. 120a-121a.)

[15] Judge Anderson died shortly after the petitions for rehearing were decided.

[16] The district court found that CBS had failed to prove that there was any unlawful tying, group boycott, or monopolization. (Pet. App. 116a-120a.) The court of appeals upheld these rulings. (Pet. App. 8a-11a, 23a n.29.)

[17] Judge Moore filed a separate opinion in which he disagreed that price fixing had been proven but, paradoxically, concurred in the decision to remand for proceedings on relief. (Pet. App. 23a.) *See also* Judge Moore's opinion on the denial of petitions for rehearing, in which he voted to deny rehearing, but observed that the central premise of the majority's opinion on the merits was "unsupported by proof." (Pet. App. 125a.)

(Pet. App. 21a.) In addition, in the last sentence of the final footnote to its opinion, the court reversed the dismissal of the copyright misuse claim "for essentially the same reasons" that had led it to reverse the district court's dismissal of the price fixing charge. (Pet. App. 23a n.29.)

On December 6, 1977, the Second Circuit denied petitions for rehearing and suggestions for rehearing in banc.

SUMMARY OF ARGUMENT

The court of appeals insisted on applying a rule of per se illegality to blanket licensing even though

—it conceded that the blanket license was not a "naked restraint";

—it recognized that blanket licenses were reasonable and necessary in many circumstances;

—it held that blanket licenses were not "generally . . . unlawful";

—no judicial resources could be conserved, because a full rule of reason trial had already taken place;

—blanket licenses were required by government consent decrees; and

—every governmental agency that has studied music licensing in recent years has concluded that the performing rights organizations and the blanket licenses they offer provide a useful and necessary solution to the unique market problems in the music licensing business.

The court compounded its error by ordering as "relief" a per use license which would place highly improper re-

straints on the licensing market by imposing a system of ever-lowering artificial ceiling prices.

Evaluating blanket licensing by the rule of reason test that this Court has applied to other joint selling arrangements, the district court properly found that blanket licenses imposed no unreasonable restrain of trade. CBS did not have to deal with BMI and ASCAP; it could deal with writers and publishers directly. The blanket licensing alternative would not improperly influence the prices that would be charged in direct licensing transactions or encourage users not to deal with CBS. The court of appeals affirmed these findings and should have affirmed the conclusion that flows from them: blanket licenses do not unreasonably restrain trade.

The Second Circuit should not have recognized a doctrine of copyright misuse. The market exclusionary effects of patents and the vast sums at stake in patent suits find no parallels in the typical copyright case. Rather than extending the patent misuse doctrine to copyrights, the court should have applied to copyrights the ordinary rule that a person cannot rely on an antitrust defense to get something for nothing.

In any event, a misuse finding was totally inappropriate in the context of this case, where defendants had done no more than license in the historically accepted manner in accordance with the requirements of government consent decrees.

ARGUMENT

I. THE OFFERING OF BLANKET LICENSES BY BMI SHOULD NOT HAVE BEEN JUDGED BY PER SE RULES.

Per se rules of illegality are applied to conduct that experience has shown to be inherently bad, so that inquiry into its precise effects would not be worthwhile. Per se rules are thus designed to provide sure behavioral guides to businessmen and to avoid lengthy inquiries into practices that are plainly anticompetitive. *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355, 1365 (1978); *United States* v. *Container Corp. of America*, 393 U.S. 333, 340-41 (1969) (Marshall, J., dissenting); *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). Here, the court of appeals applied a per se rule even though it found blanket licensing not inherently bad, even though the goals of predictability and conservation of judicial resources could not be achieved, and even though the practices complained of are of the kind traditionally tested under the rule of reason.

This Court has recently reaffirmed that "[p]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977). In *Northern Pacific Railway Co.* v. *United States*, the Court described conduct which was appropriate for per se treatment:

> "agreements or practices which because of their pernicious effect on competition and *lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to

> the precise harm they have caused or the business excuse for their use."

356 U.S. at 5 (emphasis added).

Justice Stevens' opinion in the recent case of *National Society of Professional Engineers* v. *United States* contains a similar formulation:

> "agreements whose *nature* and *necessary effect* are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . are 'illegal per se' . . . ."

98 S. Ct. at 1365 (emphasis added).

We believe that there are few, if any, cases to come before this Court in recent years in which application of per se rules was less appropriate than in this one. The Second Circuit branded the blanket license illegal per se while at the same time conceding that it was *not* a "'naked restraint.'" (Pet. App. 22a.) The court declined to order that blanket licenses be enjoined, recognizing that there are users who "deem the blanket license desirable," (Pet. App. 22a) and that for certain types of users blanket licenses are essential. (Pet. App. 13a-16a.) Indeed, the court said, "we, in no way, intimate . . . that the blanket licenses given by ASCAP [and BMI] generally are unlawful." (Pet. App. 21a n.26.)

The recognition that blanket licenses offered by BMI and ASCAP are highly valuable in some circumstances refutes the essential premise for the application of the per se label. Clearly, the Second Circuit did not find that blanket licenses "lack . . . any redeeming virtue."

Further, in holding that the offering of blanket licenses was per se illegal the Second Circuit did not achieve any of the efficiency goals of per se rules. Conservation of trial time was hardly a factor since the district court had al-

ready conducted an exhaustive rule of reason trial. *See Mackey* v. *National Football League*, 543 F.2d 606, 619-20 (8th Cir. 1976), *cert. dismissed pursuant to Rule 60*, 434 U.S. 801 (1977). The goal of predictability was hardly protected by holding per se unlawful practices which were required by government consent decree and had been openly engaged in by thousands of writers and publishers for decades. The result could hardly have been more startling. Nor was predictability advanced by the enunciation of an "exception" to the per se rule in which the legality of the practice turns on the "market necessity" of the practice to the buyer (Pet. App. 13a-16a), or by the ruling that a practice is per se illegal which is not "generally" unlawful. (Pet. App. 21a-23a.)

Finally, the Second Circuit applied a per se rule to conduct which historically had always been tested by the rule of reason, and then compounded the error by assuming that BMI was organized in the same way as ASCAP. ASCAP, of course, is a classic joint selling agency, a group of competitors who license their property as a package and distribute the revenues among themselves. Judges Gurfein and Anderson characterized this as per se unlawful price fixing:

> "the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition."

(Pet. App. 11a; footnote omitted.)

This Court, however, has recognized that there are often important justifications for joint selling activities and has always tested them under the rule of reason. When presented with joint delegation of pricing decisions to an

agency controlled by a group of competitors, or with an express agreement among competitors as to the prices at which they would buy or sell during a given part of the business day, this Court has looked to the purpose, effect and industry context of such agreements, and often upheld them under the rule of reason. *See Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 163 (1931); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918).

In *Standard Oil Co. (Indiana)* v. *United States*, the Court was confronted with agreements among licensors of interlocking patents on a price for a license to all of the patents and on a formula for division of the proceeds. The Court noted that each patent owner

> "was to share in some fixed proportion the fees received under these multiple licenses. The royalties to be charged were definitely fixed in the first contract; and minimum sums per barrel, to be divided between the Texas and Indiana companies, were specified in the second and third."

283 U.S. at 168. Despite the obvious impact of these agreements on price, the threshold question whether such agreements should be judged by per se rules was answered in the negative. The Court stated that, "Such contracts must be scrutinized to ascertain whether the restraints imposed are regulations reasonable under the circumstances . . . ." *Id.* at 169. The Court then proceeded to find that the agreements did not violate the antitrust laws because each competitor retained the right to issue individual licenses. *Id.* at 170-71. Here, the Second Circuit should have applied the same kind of analysis to the joint selling activities of ASCAP.

Although plainly erroneous, the Second Circuit's analysis with respect to ASCAP did at least proceed from the fact of an organization of competing sellers allocating revenues among themselves. But in applying its per se ruling to BMI,[18] the Second Circuit acted wholly without any rationale.

BMI is not a membership organization of writers and publishers. It is an independent corporation. BMI's writer and publisher affiliates own no stock in BMI and have no role in BMI's operation or management; each has only an individual contract with BMI, and none participates in decisions as to how license receipts will be distributed. BMI acts as an ordinary middleman, making its own decisions on how much it will pay its suppliers and how much it will charge its customers. No prior case has ever characterized these ordinary activities of a middleman as price fixing.

II. THE OFFERING OF BLANKET LICENSES PROVIDES A COMPETITIVE ALTERNATIVE AND DOES NOT UNREASONABLY RESTRAIN TRADE.

In deciding to apply per se rules to the offering of blanket licenses, the Second Circuit discussed the question whether the blanket license improperly affected direct license prices. It is of course true that any conduct—of joint selling agencies or others—which may improperly affect price may ultimately be found to violate the antitrust laws. Such conduct, however, is subject to analysis under the rule of reason rather than under per se rules.[19]

[18] The Second Circuit said in a footnote: "The references hereafter to ASCAP or appellant [*sic*] shall be taken to include BMI, unless the context clearly indicates otherwise." (Pet. App. 2a n.1.)

[19] The Second Circuit misread *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), as holding that any practice which affects price is per se unlawful price fixing. In fact, what the case holds is that an agreement whose *purpose* is to fix prices is per se unlawful even if price is not an express term of the agreement. Thus this Court stated:

> "[A] combination formed for the *purpose* and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*. . . . Proof that a combination was formed for the *purpose* of fixing prices and that it caused them to be fixed or contributed to that result is proof of . . . a price-fixing conspiracy . . . ."

Id. at 223-24 (emphasis added).

See, e.g., United States v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978); *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975); *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969); *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553 (1936); *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588 (1925); *Maple Flooring Manufacturers Association* v. *United States*, 268 U.S. 563 (1925).

The district court saw nothing inherently evil in the offering of blanket licenses, and hence properly tested blanket licenses under the rule of reason The trial court's rule of reason analysis of the facts led to the conclusion that blanket licenses have no improper effect on direct licensing prices and provide a reasonable solution to the unique problems of music licensing. And this evaluation by the district court is shared by the many governmental agencies that have carefully considered the music licensing business.

A. The Blanket License Is a Response to the Needs of a Market Created by Congress.

A market in music performance rights exists because Congress determined that it was desirable that there be such a market. In carrying out its purpose to "stimulate artistic creativity for the general public good," *Twentieth*

Century Music Corp. v. *Aiken,* 422 U.S. 151, 156 (1975), Congress elected not to award subsidies but rather to create conditions under which a market could develop. Markets in tangible goods arise without the need for legislative encouragement, because sellers of tangible goods can retain possession until they are compensated. But a market in musical compositions cannot arise if the composition may be appropriated by anyone who simply hears it performed. Hence, Congress has made it a civil and criminal offense to publicly perform copyrighted music without the copyright owner's permission. *See* 17 U.S.C. §§ 501-06. This power to prevent use by others was not designed to discourage the performance of copyrighted music; rather, it was intended to encourage creation by offering the possibility of market rewards, thereby securing "the general benefits derived by the public from the labors of authors," *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 127 (1932). The market place thus determines which creators will be compensated for their works.

There is a very active worldwide market in music performance rights. More than 70,000 writers and publishers are affiliated with BMI or are members of ASCAP; thousands more foreign individuals and firms license through the more than thirty other performing rights organizations in other countries. The works of these writers and publishers are licensed to thousands of music users, including concert halls, night clubs, background music services, and radio and television stations and networks.

Because of the nature of music and the large numbers of buyers and sellers, trade in the market is largely carried out through bulk licensing intermediaries rather than face to face between creators and music users. Even a small music user such as a neighborhood tavern with a piano

player on weekends may need access to works of numerous composers throughout the world. As songs change in popularity, rights to additional songs may be required. Moreover, it may be difficult to know in advance which compositions need to be licensed, since the piano player may play requests or spontaneously perform a composition not in his regular repertory.

The amount the tavern owner can afford to pay for music rights is limited by the extra receipts he can earn by having the piano player. Even if the tavern owner could obtain licenses for a few cents apiece, the task of seeking out the numerous, widely scattered publishers of the compositions involved and negotiating the licenses would vastly exceed the amount available for the purpose. The same transaction costs would deter the publishers from seeking out the tavern owner to solicit licenses.

These market characteristics do not change appreciably even with larger users such as local radio stations. Their budgets for music—at least as measured by what they have traditionally paid BMI and ASCAP for blanket licenses—would be insufficient to cover the transactional expenses of direct negotiation, even if they could identify sufficiently in advance the compositions they needed.

These, then, are the principal market characteristics which make direct licensing impractical for most music users: (a) rights to a large number of songs are needed; (b) it is difficult to predict in advance what rights will be required; and, most importantly, (c) the transaction costs in obtaining rights to individual songs are prohibitively high in relation to the value of the rights. These barriers to direct licensing are natural barriers which would act as a deterrent to direct licensing without regard to whether

or not bulk licensing organizations such as BMI or ASCAP were in existence.

If BMI and ASCAP did not exist, the natural barriers would result in the acquisition of far fewer public performance licenses—with the consequence that users would either perform less music than they would prefer, or perform some music without the licenses necessary to avoid civil and criminal liability. BMI and ASCAP thus exist because they fill a definite and clear market need. By offering blanket licenses which substantially eliminate transaction costs, BMI and ASCAP can give the user access to the music he needs at a price he can afford and can give him the flexibility to perform spontaneously a broad range of music without fear of infringement. At the same time, they can provide compensation to those who create the music.

The district court summarized the virtues of the blanket license as follows:

> "[I]t provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is 'automatically' covered by the blanket license."

(Pet. App. 26a.) The reliance of most users on BMI and ASCAP as middlemen reflects the decisions of those users that dealing in bulk is better than dealing individually or doing without music.

The court of appeals thought that it perceived a way in which the availability of blanket licenses had the effect of making direct licenses less available. The court of appeals majority assumed *a priori* that the method by which television network music is to be licensed is within the control of the owner of the music. Apparently unaware of the extensive record evidence to the contrary, the court posited that

> "the very availability of the blanket license . . . must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete."

(Pet. App. 20a; emphasis in original.)

The record shows, and the district court found, that this proposition is utterly false. The availability of the blanket license gives the power of choice to the user of music, not to the copyright owner. The network determines what music it wants; the selection of music is made by the network or the program producer. (Pet. App. 56a-61a, 63a-64a, 67a-69a, 72a, 90a-93a, 103a, 108a, 112a.) Further, there is a high degree of interchangeability among songs suitable for network television use, and if a particular song is not available, there are any number of suitable alternatives. (Pet. App. 48a, 92a, 119a-120a.) If a copyright owner will not license by the method the network wants, other music will be substituted and his music will not be used. (Pet. App. 89a-93a, 105a-106a, 108a, 112a, 119a-120a.) Hence, the power to make the music selection gives the network the power to determine the licensing method.

So long as a user elects to employ blanket licenses, the copyright owner has no occasion to seek direct sales to that

user, since the user does not want to buy two licenses for the same music. When a user chooses not to take a blanket license, the copyright owner must compete for direct sales to that user if he wants his music used. Literally and figuratively, it is the network which calls the tune. The blanket license is simply not an option that belongs to the copyright owner, and its availability does not affect the availability of direct licenses.

Furthermore, the availability of direct licenses has a constraining effect on the prices that BMI and ASCAP can charge for blanket licenses.[20] Although blanket licenses are now regarded by network users as less expensive than direct licensing, if the royalty fees and administrative expenses of blanket licensing became higher than the royalty fees and administrative expenses of direct licensing, music users could, and would, elect to license directly. Thus, the availability of direct licensing places a significant constraint on the price of blanket licenses. As all the expert economists who testified at trial recognized, this constraint

[20] CBS advanced the reverse proposition, arguing that in direct licensing transactions copyright owners would ask for fees equal to what they would receive if CBS continued to use blanket licenses. Both of the courts below rejected this contention:

> "We recognize that CBS contends that a blanket licensing system overhanging the market in any combination of circumstances will necessarily affect the price for each set of individual performing rights. On this record we are not convinced that this is necessarily so. And the District Court found the contrary.
>
> "CBS has asserted that an individual member of ASCAP, thrown into a direct negotiating market for the first time, will tend to measure the royalty he asks for a particular performing right by the royalty he has actually been receiving from ASCAP as his share under the blanket license. Considering the counterforce of the strong bargaining power of CBS, we cannot accept this as more than a theoretical assumption."

(Pet. App. 22a n.27.)

constitutes price competition even though users have not actually gone out and solicited price quotations for direct licenses. (8 A. 1670; 14 A. 3982; 15 A. 4384-85.)

In *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), the Court of Appeals for the Ninth Circuit was presented with an antitrust attack on ASCAP's offering of blanket licenses, again based on a record devoid of proof of anything beyond the mere existence of ASCAP as a bulk licensor of music. In one of two alternative grounds,[21] the Ninth Circuit held that ASCAP did not unreasonably restrain trade because there was no proof of any artificial restrictions on the availability of the direct licensing alternative. 372 F.2d at 4. This unimpaired availability of direct licensing is sufficient assurance that blanket license prices are being limited by the operation of competitive forces. The fact that users have overwhelmingly chosen blanket licenses in no way diminishes the existence of those competitive forces.[22]

CBS has argued that direct licenses are not truly available because individual writers and publishers of music

[21] The other ground was based on a provision of the ASCAP consent decree not present in the BMI Decree.

[22] The Second Circuit attempted to distinguish *K-91* and harmonize the result of that decision with its own price fixing ruling. (Pet. App. 13a-17a, 21a n.26.) Although the Ninth Circuit had not relied upon, or even mentioned, the stipulation involved, the Second Circuit pointed out that the parties in *K-91* had stipulated that the defendant, a local radio broadcaster, would have found it "'commercially, practicably and virtually impossible . . . to acquire a separate license for each performance broadcast . . . .'" (Pet. App. 14a.) The Second Circuit agreed on this basis that the *K-91* result was correct, and held that the difference in CBS' needs justified a departure from *K-91*. But if, as *K-91* held, the direct licensing alternative saves the blanket license where transaction costs would prohibit direct licensing, then *a fortiori* it saves the blanket license in the network context where the direct licensing alternative is a real constraint on blanket license prices.

would refuse to deal with it if it attempted to obtain direct licenses. The district court found that writers and publishers would readily and willingly negotiate with CBS. (Pet. App. 79a-108a, 111a-120a.) The court concluded that "performance rights to any given type of composition are available from a number of sources if CBS chooses to tap them," (Pet. App. 120a) observing that

> "Copyright proprietors are eager to have their music performed on television not simply to earn performance royalties distributed through ASCAP and BMI, but because a television performance before millions of viewers is the most effective way to sell phonograph records and sheet music, and to generate performances by other music users. No less than eleven witnesses testified to the compelling desire of writers and publishers to gain television exposure for their music."

(Pet. App. 90a-91a.)[23] The court summarized as follows:

> "[T]here is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license."

(Pet. App. 112a.)

The district court thus concluded that since CBS was free to contact writers and publishers directly and since writers and publishers would willingly deal with CBS on a price-competitive basis, CBS was as free to pursue direct licenses as it would be if ASCAP and BMI were not in the market. Their presence in the market is in fact procompetitive; it gives users an additional option—an option free of transaction costs and productive of wide flexibility

[23] The only writer or publisher at trial who testified that his companies would refuse to negotiate direct licenses with CBS was a CBS employee—the vice president of two of the music publishing companies owned by CBS. (Pet. App. 90a.)

in music selection. To drive the blanket license from the market would be plainly anticompetitive.

B. The Useful Role of the Blanket License Has Been Recognized by Every Governmental Body Concerned With Music Licensing.

The useful and necessary role which the performing rights organizations and the blanket licenses they offer play in making possible commerce in performance rights has been recognized by every governmental body which has studied music licensing in recent years.

In the Copyrights Act of 1976, Congress provided for compulsory blanket licensing of certain kinds of secondary transmissions by cable television systems. *See* 17 U.S.C. § 111. The House Report on the legislation stated that blanket licensing was chosen because

> "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."

H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 89 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5704.

In the Copyrights Act, Congress created a Copyright Royalty Tribunal to administer the various compulsory licensing provisions of the Act. *See* 17 U.S.C. §§ 801-10. In providing that the Copyright Royalty Tribunal shall collect and distribute the compulsory fees payable by jukebox operators, Congress expressly mentioned BMI and ASCAP as possible recipients. 17 U.S.C. §§ 116(c)(4), (c)(3).

The government agencies most familiar with the problems facing copyright owners and music users have also

determined that blanket licensing is a reasonable response to those problems. In a 1978 rulemaking proceeding regarding compulsory music licenses for noncommercial broadcasters, the Copyright Royalty Tribunal determined that blanket licensing was

> "the most suitable method for licensing public broadcasting to perform musical works."

43 Fed. Reg. 25,068, 25,069 (1978).

In a report to Congress pursuant to 17 U.S.C. § 114(d), the Register of Copyrights recommended that Congress create performance rights in sound recordings and that the rights be subject to compulsory blanket licensing. 43 Fed. Reg. 12,763, 12,767 (1978).

Finally, the Department of Justice, in consent decrees approved by federal courts, has required that BMI and ASCAP offer blanket licenses. (Pet. App. 6a, 29a-33a.) The Department of Justice has principal responsibility for enforcing the antitrust laws, and BMI has operated under consent decrees virtually since its inception. *United States* v. *Broadcast Music, Inc.*, [1941-1943 Transfer Binder] TRADE REG. REP. (CCH) ¶ 52,516 (E.D. Wis. 1941). While a private litigant is free to challenge practices authorized by a consent decree, *see Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961), the judgment of the Department that blanket licensing is not unreasonable is entitled to respect.

C. The Per Use License Sought by CBS Would Be Inherently Anticompetitive.

The opinion of the Second Circuit suggested that BMI and ASCAP could be allowed to continue offering blanket licenses if they were also

> "required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing."

(Pet. App. 22a.) Because CBS had failed to prove liability, the district court did not need to reach the question of the anticompetitive character of the relief sought by CBS.[24] The trial record, however, demonstrates that, far from achieving a competitive market, the per use license would be a necessarily anticompetitive weapon in the hands of the music user.

The per use license sought would include the following elements: (1) standard rates would be charged by ASCAP or BMI for each type of use;[25] (2) CBS would have the choice of licensing a particular song either through the ASCAP or BMI per use license at the standard fee or directly from the copyright owner at a negotiated fee; (3) the standard per use rates would be adjusted periodically to reflect prices reached in direct licensing transactions. (Pet. App. 38a n.7.)

If it had the alternatives of using a particular song at the standard BMI per use rate or taking a direct license from the copyright owner, CBS would take a direct license only when it could get it for a fee that was lower than the standard per use rate. If CBS could not get a direct license for

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[24] Judge Moore, in his concurring opinion on the appeal, voted to remand the case for relief despite his apparent disagreement that liability had been proven. (Pet. App. 23a.) Obviously, a party is not entitled to relief without proof that its rights have been violated.

[25] Since individually negotiated licenses can be obtained directly from copyright proprietors now, there would be no point in requiring per use licensing by BMI or ASCAP on an individually negotiated basis.

less, it could use the song without the owner's permission by simply paying the per use rate. (3 A. 197-99; 4 A. 334-38; 16 A. 4770.)

The standard per use rate would therefore be a ceiling on the prices that could be charged by the copyright owner for direct licenses. Rather than permitting a copyright owner to negotiate with CBS in a free market by competing against other copyright owners, the per use system would force the owner to compete against himself. And, since per use rates are to be adjusted periodically to reflect amounts paid in direct licensing transactions, the ceiling is designed to be lowered but never raised. This would provide CBS—the largest and most powerful buyer of music in the world—with an economic weapon against writers and publishers unknown in any free market. To achieve such a result in the name of antitrust would be a truly remarkable perversion.[26]

III. THE OFFERING OF BLANKET LICENSES BY BMI DOES NOT CONSTITUTE COPYRIGHT MISUSE BY BMI OR ITS AFFILIATES.

In the final sentence of the last footnote of its opinion, the Second Circuit made a ruling which may have had the effect of rendering unenforceable every musical copyright in the United States. Apparently without considering policy, precedent, or practical effect, the court wrote only that, "We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim." (Pet. App. 23a n.29.) Even if it were assumed that the antitrust ruling was correct, this copyright misuse ruling is indefensible.

[26] As an alternative to the issuance of a per use license CBS requested that BMI and ASCAP be enjoined from offering blanket licenses to any television network. (Pet. App. 25a.) This proposal is no less anticompetitive than the per use proposal. CBS' testimony revealed that CBS' goal in seeking an injunction is to deny the other two television networks what they regard as an effective alternative in competing against CBS. (3 A. 84-86; 19 A. D764-65, D877, D1016-17.)

To place the ruling in context, we begin with an analysis of the circumstances under which an antitrust defense may be used to excuse otherwise plainly improper conduct. Ordinarily, it cannot. For example, a defendant sued for goods sold and delivered, or for that matter any other breach of contract, may not escape his obligation to pay by asserting that the plaintiff is guilty of an antitrust violation. *See, e.g., Kelly* v. *Kosuga,* 358 U.S. 516 (1959); *Bruce's Juices* v. *American Can Co.,* 330 U.S. 743 (1947).

The impact of an antitrust-based misuse defense is draconian and quixotic, bears no necessary proportion to the offense, and permits a wrongdoer to go free. As this Court said in *Bruce's Juices, supra,* an antitrust defense could

> "be justified only if it would be at least a rational, nondiscriminatory and appropriate means of making the policy of the statute effective. To allow a buyer to get his goods for nothing . . . does not meet this test.
>
> "It would seem that one test of the rationality and appropriateness of such a defense . . . would be that the reparation it permits should be measured at least roughly by the extent of the injury caused by the violation. This, of course, is the principle of the suit for triple damages. But that is not the principle of the defense here urged. The extent of its indemnity is not measured by injury, and not measured by the dealings affected with the alleged violation. It is measured solely by the amount of credit the buyer ob-

> tained from the seller. . . . Had Bruce's delinquency been greater, so would its gain . . . ."

330 U.S. at 752-53. This rule against permitting a defendant wrongdoer to escape by charging the plaintiff with an antitrust offense extends even to suits where the plaintiff's complaint is of an antitrust violation. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

The only exception to this rule which this Court has recognized is in the patent field. The exception originated in *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488 (1942), where this Court recognized a misuse defense in a suit by the owner of a patent on a machine for dispensing salt tablets who had tied sale of salt tablets to leasing of the machine. This defense meant that the patent owner who was guilty of misuse could not enforce his patent even against an infringer who was not a target of the misuse. While the Court discussed the patent owner's conduct as contravening patent policy, the conduct had antitrust implications as well. In subsequent cases, the misuse doctrine has been employed wherever any antitrust violation by the patent holder has been found; analysis of patent policy as such has not been deemed necessary. *See, e.g., In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Carter-Wallace, Inc.* v. *United States*, 449 F.2d 1374 (Ct. Cl. 1971). While the "far-reaching social and economic consequences of a patent," *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945), may justify the patent misuse exception to "the overriding general policy . . . 'of preventing people from getting other people's property for nothing . . . ,'" *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), there is no warrant for extending this extraordinary weapon to

the far different world of copyrights. *See Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 343 (1971).

There are a few lower court cases on the question whether there is a copyright misuse defense,[27] but none can be said to have resolved the issue. The one case which expressly recognized the competing policies—the Second Circuit's decision in *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)—ducked the question by announcing a balancing test and ruling in favor of the copyright owner.[28]

Analysis of the vast differences between patents and copyrights indicates clearly that the ordinary rule pro-

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[27] For cases stating that copyright misuse is not a defense, *see Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd per curiam sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959); *Buck* v. *Cecere*, 45 F. Supp. 441 (W.D.N.Y. 1942); *Society of European Stage Authors & Composers, Inc.* v. *WCAU Broadcasting Co.*, 35 F. Supp. 460 (E.D. Pa. 1940); *Buck* v. *Spanish Gables, Inc.*, 26 F. Supp. 36 (D. Mass. 1938); *Buck* v. *Newsreel, Inc.*, 25 F. Supp. 787 (D. Mass. 1938); *M. Witmark & Sons* v. *Pastime Amusement Co.*, 298 F. 470 (E.D.S.C.), *aff'd*, 2 F.2d 1020 (4th Cir. 1924); *Harms* v. *Cohen*, 279 F. 276 (E.D. Pa. 1922). *See also Foreign Car Parts, Inc.* v. *Auto World, Inc.*, 366 F. Supp. 977, 979 (M.D. Pa. 1973) ("doubtful" that there is such a defense); *United Artists Associated, Inc.* v. *NWL Corp.*, 198 F. Supp. 953, 958 (S.D.N.Y. 1961) ("substantial question" whether there is such a defense).

For cases stating that copyright misuse would be a defense, *see Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957); *Columbia Pictures Corp.* v. *Coomer*, 99 F. Supp. 481 (E.D. Ky. 1951); *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed per curiam sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

[28] *See generally* Gibbs, *Copyright Misuse: Thirty Years Waiting for the Other Shoe*, 23 ASCAP Copyright L. Symp. 31 (1977); Fine, *Misuse and Antitrust Defenses to Copyright Infringement Actions*, 17 Hastings L.J. 315 (1965); Note, *The Misuse Defense in Copyright Actions*, 37 N.Y.U. L. Rev. 916 (1962); Nicoson, *Misuse of the Misuse Doctrine in Infringement Suits*, 9 U.C.L.A. L. Rev. 76 (1962).

hibiting antitrust defenses should be applied to copyright actions. The leading patents are of overwhelming economic importance, supporting entire industries and hundreds of millions of dollars of capital investment. Access to a whole field of endeavor may be impossible without the right to practice one or more key patents. Misconduct by the holder of patents such as these can have substantial impact on the economy.

A copyright, on the other hand, has no such effect. While a copyright may, like a patent, be of significant value, copyrights do not approach the leading patents in terms of their impact on the market and on others. Unlike the owner of a patent, the owner of a copyrighted song cannot exercise control over any market. Even the most original and outstanding song may be replaced by many other songs under copyright or in the public domain. (Pet. App. 48a, 92a, 119a-120a.) Any composer is free to create a new song on the same subject matter or a song that is otherwise suitable for the uses planned. No copyrighted song has any exclusionary effect on anyone in the business of creating or performing music.

Furthermore, there is generally a vast difference in what is at stake in an infringement suit. Patent infringement suits often involve many millions of dollars; the typical musical copyright claim is likely to involve less than one thousand dollars. If misuse defenses are permitted, every copyright infringement action can be transformed into an expensive antitrust case, dwarfing the value of the typical copyright action. To further expand the "very strange class of private attorneys general," *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), to include deliberate infringers of copyrights is to threaten destruction of the system of copyright protection Congress has created.

Even if this Court were unwilling to conclude that a misuse defense could never be recognized in a copyright

action, misuse certainly should not be found in the circumstances presented here. All that BMI's affiliates have done is to seek to market their works in the historically accepted manner. Neither the copyright laws, nor the Department of Justice's consent decrees, nor any prior judicial decision had given them any warning that all or any part of the value of their works was subject to forfeiture because of their dealings with BMI. Indeed, each of these authorities indicated that bulk licensing by BMI was a lawful and proper practice.

By its casual misuse ruling, the Second Circuit has threatened the livelihoods of the members of an entire profession. It has jeopardized the rights of the 70,000 writers and publishers who are affiliated with BMI or members of ASCAP, and of the thousands of writers associated with foreign performing rights organizations whose works are made available in this country through BMI and ASCAP. It has imperiled not just their income from the performing rights licensed through BMI and ASCAP,[29] but as well their income from sheet music, synchronization rights, mechanical rights for records and tapes, dramatic rights and performing rights for motion pictures.

The harsh nature of these penalties is exacerbated by the extreme difficulty the writers and publishers would have in purging the misuse so as to enable themselves once again to enforce their copyrights. BMI's affiliates cannot control BMI's licensing practices. To attempt to abrogate their contracts with BMI in order to avoid taint by BMI's practices would be self-defeating, since direct licensing of most music users is impossible.

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[29] A number of music users have already asserted a misuse defense to copyright infringement claims in reliance on the Second Circuit's decision. *See, e.g., Broadcast Music, Inc.* v. *1243-20th Street, Inc., T/A Rocky Racoon's*, No. 77-1385 (D.D.C., consent judgment filed Sept. 19, 1978).

The court below apparently has required a drastic forfeiture of rights for conduct which, if improper at all, would not justify a fraction of the penalty imposed.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with directions that the district court judgment be reinstated with respect to BMI and its affiliates.

Respectfully submitted,

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FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
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COLUMBIA BROADCASTING SYSTEM, INC.,
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AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
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COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Pet. App. 24a) is reported at 400 F. Supp. 737 (1975) (Lasker, J.). The opinion of the United States Court of Appeals for the Second Circuit

(Pet. App. 1a), reversing the decision of the District Court, is reported at 562 F.2d 130 (1977).*

Jurisdiction

The judgment of the court of appeals was entered on August 8, 1977 (Pet. App. 122a). The petitions for writs of certiorari were filed on May 5, 1978, and granted on October 2, 1978, (99 S. Ct. 77). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Is it price-fixing and unlawful *per se* under Section 1 of the Sherman Act for an industry-wide combination of otherwise competing sellers (music publishing corporations) to agree to have a common sales agency (ASCAP or BMI) market their products (music performance rights) at prices fixed by the combination?

2. Is such conduct exempted from Section 1 because:

(a) a decree (entered 37 years ago) made the common sales agency's right to sell the product non-exclusive, and a further decree (entered 28 years ago) enjoined the agency from interfering with sales, if any, made by seller-members of the combination directly to buyers;

*"Pet. App." refers to petitioners' identical appendices to their petitions for certiorari.

"Dep't. App." refers to the appendix to *amicus* Department of Justice's brief.

"NBC App." refers to the appendix to *amicus* NBC's brief.

Portions of the record on appeal in this action appear in the Joint Appendix and are cited as indicated below:

Vol. No.	Type of Document	Cited As
1-2	Pleadings, briefs, affidavits and opinions	"JA"
3-16	Trial transcript	"Tr."
17-19	Depositions	"D"
20-24	Court Exhibits ("CX"), Plaintiff's Exhibits ("PX" or "3MPX"), ASCAP Exhibits ("AX"), BMI Exhibits ("BX")	"E"

References to portions of the record not appearing in the Joint Appendix are cited to the record on appeal.

(b) although, during the last 37 years, no member has in fact sold directly to any buyer (in the relevant market), it is physically possible for television network buyers to overcome the barriers to direct dealing after a period of advance preparation of from 6 to 18 months' duration; and

(c) it has not been shown that members would boycott buyers who stopped dealing with the common sales agency?

3. Is the conduct described above unlawful *per se*, or under the rule of reason, where:

(a) both combinations have admitted, indeed asserted, and the courts below have found, that such collective licensing is not necessary to enable the relevant market (the licensing of performance rights for television network programs) to function;

(b) both combinations will issue only blanket licenses to their entire copyright pools at a single annual price for each pool, which forecloses licensees from dealing directly with music publishing corporations for separate uses (since direct licenses would mean paying twice for the same music);

(c) both combinations have refused to license on a per-use basis, even though it would be (i) feasible to do so (since they now distribute royalties to their members on a per-use basis), and (ii) less restrictive than the blanket system (since it would permit direct licensing to occur);

(d) any attempt by a network buyer to surmount the barriers to direct licensing that necessarily arise from the perpetuation of a blanket-licensing system is a course of conduct that threatens the buyer with appreciable competitive disadvantage and loss;

(e) the combinations' purpose and effect are to eliminate price competition, inflate prices over competitive market levels and achieve an allocation of resources benefiting published music to the disadvan-

tage of other program elements, including music originally created for television programs; and

(f) nothing of cognizable value is achieved by the system of blanket licensing television networks which cannot be achieved as well or better in a competitive market.

4. Is it unlawful tying for ASCAP and BMI to condition the licensing of any copyrighted composition in their pools on the network's acceptance of a blanket license to the entire pool, given the present barriers to direct licensing and the network's inability to surmount those barriers without disadvantage and loss and an advance period of preparation of from 6 to 18 months' duration?

5. Are such combinations guilty of monopolization under Section 2 of the Sherman Act where (a) an ASCAP blanket license is not reasonably interchangeable with a BMI blanket license, and (b) as a result of the barriers and practices described above, neither blanket license is reasonably interchangeable with direct licensing?

6. Are the combinations engaged in the practices described above guilty of misusing the copyrights in their pools?

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 16 of the Clayton Act, 15 U.S.C. § 26, are quoted in defendants' briefs. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by

> imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Statement of the Case

A. Nature of the Case.

This action was commenced on December 31, 1969, against the American Society of Composers, Authors and Publishers ("ASCAP"), its president, certain named members of ASCAP and the class of all other members of ASCAP; and against Broadcast Music Inc. ("BMI"), certain named affiliates of BMI and the class of all other BMI affiliates. The complaint seeks an injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, against defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202 (JA 19).

The principal Section 1 claim asserted is that ASCAP and BMI are price-fixing cartels of music publishing corporations—*i.e.*, joint-sales agencies which fix the prices at which nondramatic performance rights of copyrighted music are licensed to television networks, including CBS. That claim and a related charge of copyright misuse arise from the fact that each music publishing corporation has authorized one or the other of those organizations to license its music* at prices and terms fixed by the organization's Board.

Both ASCAP and BMI license only on a package (or, as it is commonly known in the industry, "blanket") basis—*i.e.*, a license to each copyright pool at an annual fee that remains constant irrespective of the nature or amount of the licensee's music usage or any licenses the user might obtain directly from the publishers in interest (Pet. App. 6a-7a). That fact, in addition to the various

*Unless otherwise indicated, reference to the licensing of music shall mean the licensing of nondramatic performance rights.

barriers to direct licensing created by each cartel, results in tying and monopolization and further acts of misuse, as is also averred in the complaint, and as will be discussed more fully below.

B. The Parties.

CBS Inc.* is a New York corporation engaged in the business, among others, of operating the CBS Television Network, which transmits television programs for broadcast over the facilities of five television stations owned by CBS Inc. (located in New York, Los Angeles, Chicago, Philadelphia and St. Louis) and, pursuant to affiliation agreements, approximately 190 independently owned and operated television stations located in various parts of the United States (Pet. App. 28a; E 3-4 (para. 2), 12).**

CBS obtains the rights to broadcast such programs primarily from program "packagers," which are either major motion picture production companies, such as 20th Century Fox or MCA (Universal), or smaller independents, such as MTM (Mary Tyler Moore) or Tandem Productions (Norman Lear). CBS itself produces one evening series, two daytime serials, a number of television "specials" (principally of the musical variety type), as well as news, public affairs, religious and sports programs (Pet. App. 28a; Sipes Tr. 18-19). CBS sells to advertisers the rights to have their commercial announcements broadcast in association with particular network programs on those of CBS's owned stations and CBS network-affiliated stations that choose to have those programs broadcast on their facilities (Pet. App. 28a; E 8 (para. 25), 12).

Agreements between packagers and CBS normally stipulate a price at which the packager will produce each program in a series and furnish it to CBS for original

*Since the institution of this suit, plaintiff's corporate name has been changed to "CBS Inc.".

**The designation "CBS" will be used generally throughout the brief to refer to the television network business of CBS Inc., unless the context otherwise indicates.

network use, and lower prices at which CBS may repeat network uses. For those prices, packagers supply, as part of the finished programs, every right necessary to broadcast those programs—save one: the nondramatic performance rights to the music used on those programs, which are covered by ASCAP and BMI blanket licenses issued to CBS. [Pet. App. 28a-29a; E 6 (para. 12); Sipes Tr. 19, 22, 24; Wright Tr. 403-04; Vincent Tr. 581-83; Sunga Tr. 737-38]

Each such licensing organization is a combination of many thousands of music publishing corporations and writers who have authorized those organizations, by membership (ASCAP) or affiliation (BMI) agreements, to license the nondramatic performance rights to all their copyrighted music, now existing or hereafter written. The copyright pools thus formed comprise, respectively, about three million (ASCAP) and more than one million (BMI) copyrighted compositions (Pet. App. 26a-27a).*

ASCAP, organized as an unincorporated association, is administered by a Board of Directors, consisting of 12 writer and 12 publisher members (E 92). BMI is organized as a non-profit corporation.** Since its joint-licensing activity is conducted on behalf of its publisher and writer affiliates, and since its shareholders are broadcaster-licensees, its management has an inherent, though nominal, conflict of interest which must be resolved, for it to retain affiliates, in their favor.

*Additionally, ASCAP and BMI have each entered into affiliation agreements with foreign licensing organizations in more than 30 countries. Under those agreements, ASCAP and BMI are authorized to license in the United States all musical compositions in the pools of those organizations; and each of them is authorized to license the ASCAP or BMI pool in its respective geographic area. The membership of those organizations includes more than 130,000 writers and publishers. [E 44, 46, 56, PX 578; Finkelstein D 550]

**BMI was formed in 1939 by radio broadcasters at a time when it appeared that they and ASCAP would be unable to agree on new licensing terms at the expiration of the then current licenses. CBS was one of the original founders of BMI and a shareholder until 1959. On April 3, 1959, CBS returned all of its stock in BMI to that corporation and has had no further connection with it. The other networks have similarly divested themselves of BMI stock. [Pet. App. 27a; JA 65 (para. 5); E 371; Finkelstein Tr. 3587; Cramer Tr. 4247-48]

The precise manner in which ASCAP and BMI operate, and the impact they have on the various markets they occupy, can be best understood after a brief review of the prior antitrust litigation involving their licensing practices and in contrast to the various markets they do not preempt.

C. Consent Decrees and Related Litigation.*

The 1941 ASCAP consent decree (*United States* v. *ASCAP*, 1940-43 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941)) was entered in a government suit brought soon after two judicial pronouncements of the illegality of the combination.**

The first was Mr. Justice Black's in a dissenting opinion in *Gibbs* v. *Buck*, 307 U.S. 66 (1939) (which, in a subsequent round of that case, became the majority view of this Court: *Watson* v. *Buck*, 313 U.S. 387 (1941)). *Gibbs* affirmed a three-judge district court's refusal to dismiss ASCAP's complaint that a Florida statute prohibiting price-fixing by copyright pools was unconstitutional. In the Court's view, constitutional questions had been presented that could be more clearly resolved "after final hearing and findings" (307 U.S. at 76-77). In Justice Black's opinion, "the power of the State to prohibit monopolistic price fixing" was already clear, as was ASCAP's "flagrant violation" of that statute (307 U.S. at 81):

> "Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does, require purchasers to take, at a monopolistically fixed annual fee,

*This section deals primarily with ASCAP. To the more limited extent prior BMI litigation and decrees are pertinent to the issues, they will be discussed later in this brief.

**A 1934 government action, seeking ASCAP's dissolution, had been dormant since a continuance granted after two weeks of trial (Pet. App. 4a; Finkelstein Tr. 3581).

> the entire repertory of all numbers controlled by the combination. . . .
>
> "We have here a price fixing combination that actually wields the power of life and death over every business in Florida, and elsewhere, dependent upon copyrighted musical compositions for existence. Such a monopolistic combination's power to fix prices is the power to destroy." *Id.* at 82.

The next year, in *Buck* v. *Gallagher*, 36 F. Supp. 405 (W.D. Wash. 1940), *appeal dismissed mem. sub nom. Buck* v. *Case*, 315 U.S. 780 (1942), a three-judge district court, citing Justice Black's opinion in *Gibbs*, dismissed a similar complaint by ASCAP against a similar state statute. The court held that ASCAP, as a price-fixing combination in violation of Section 1 of the Sherman Act, was precluded by unclean hands from obtaining an injunction against a state law prohibiting the same offense:

> "There can be little question here that the Society has the power to fix prices for the right to publicly perform compositions for profit. . . .
>
> "Plaintiffs . . . contend that the power to fix prices, as here, is not the odious 'price-fixing' condemned by the act in question. They say that while a gallon of oil is the same no matter who sells it, musical compositions are not gallons of oil, but each of them is different. As we have said before, it is immaterial what the subject of the trade or commerce may be. The fact is that the Society has acquired the power to fix the prices at which rights of a particular nature may be purchased by prospective users. We think that is sufficient under the statute." 36 F. Supp. at 407.

Two months thereafter the Department of Justice commenced *United States* v. *ASCAP* (Civ. 13-95), in the

Southern District of New York. The complaint charged ASCAP with price-fixing, monopolization and other restraints of trade in the licensing of radio networks, radio stations, motion picture exhibitors and other users. The 1941 consent decree, entered the following month, was silent with respect to ASCAP's licensing of motion picture exhibitors and, as to broadcasters, contained nothing of practical effect (*United States* v. *ASCAP*, 1940-43 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941)).•

Three months later, this Court in *Watson* v. *Buck*, 313 U.S. 387 (1941), in a unanimous opinion written by Justice Black, both upheld the constitutionality of the Florida statute and found ASCAP to come "squarely within" its definition of "price-fixing combinations" in restraint of trade (313 U.S. at 398, 404). As to ASCAP's contention

> "based on the idea that Congress has granted the copyright privilege with relation to public performances of music, and that with reference to the protection of this particular privilege, combination is essential," 313 U.S. at 404,

the Court stated,

> "We are therefore asked to conclude from the asserted necessities of their situation that Congress intended to grant this extraordinary privilege of combination. This we cannot do. We are pointed to nothing either in the language of the copyright laws or in the history of their enactment to indicate

•For example, ASCAP was given the option of licensing radio broadcasters on a basis of compensation which would vary in direct proportion to actual performances, but was not required to do so (1940-43 Trade Cas. at 404 (para. 3)). It was directed to issue, on a broadcaster's request, a blanket license on a "per program basis of compensation" (*ibid.*); but, as ASCAP has admitted in this trial, and as the court of appeals found, "The utility of the per program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming" (Pet. App. 7a n.9; Finkelstein Tr. 3769-70). Similarly, while ASCAP was enjoined from holding exclusive rights to license its members' music, it was expressly permitted to require its members to deposit any direct-licensing fees into the general ASCAP revenues to be "distributed in the same manner as other revenues" (1940-43 Trade Cas. at 403 (para. 1)).

> any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade." *Ibid.*

Since the Florida law proscribed intrastate price-fixing, which is condemned by the Sherman Act when extended into interstate trade, and since ASCAP concededly operates in interstate commerce, this Court's conclusion that ASCAP was a "price-fixing combination" in violation of the state statute necessarily indicated a Sherman Act offense.

The next round of litigation, *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions), and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949), involved ASCAP, its music publishing corporation members, and motion picture exhibitors. At that time the music publishing corporations, while competing on price in the direct licensing of synchronization rights• to motion picture producers, elected to license the performance rights to the same music on a blanket basis through ASCAP to motion picture exhibitors (80 F. Supp. at 893). So long as the publishers threatened exhibitors, rather than producers, with suits for copyright infringement, the exhibitors had no choice (other than litigation) but to accept ASCAP's blanket terms (*id.* at 895). For it was impossible for the exhibitors directly to license music in movies that had not yet been made; and, with respect to movies that had already been filmed (with music recorded in their sound tracks—referred to in the industry as "music-in-the-can"), the exhibitors, in any direct-licensing transactions, would have been placed (as it was later complained in *Alden-Rochelle*) "in an obviously impossible bargaining position" (80 F. Supp. at 904).

Witmark was a publishers' suit for infringement against exhibitors who had declined to accept ASCAP blanket licenses. The exhibitors defended with assertions of

•The right to record music in the sound tracks of motion pictures in synchronization with filmed performances (Berman Tr. 775-77).

copyright misuse, and the district court, after a trial, dismissed the complaint on that ground:

> "It cannot be denied . . . that plaintiffs and their associates, acting in concert through Ascap, fix prices and completely control competition and thereby restrained trade in violation of Section 1 of the Sherman Anti-Trust Act . . . ." 80 F. Supp. at 849.
>
> "However free plaintiffs and their associates in Ascap may have been from any design or intent to extend their copyright monopoly, or however beneficial it may be for them to carry on their business in this manner, or however inconvenient it may be for them to function otherwise, such facts and circumstances will not permit them to enlarge their lawful monopoly." *Id.* at 848.

In *Alden-Rochelle*, 164 plaintiffs (who operated two hundred motion picture theaters) sued ASCAP directly for injunctive relief against antitrust violations. The court held:

> "Almost every part of the Ascap structure, almost all of Ascap's activities in licensing motion picture theatres, involve a violation of the anti-trust laws. Although each member of Ascap is granted by the copyright law a monopoly in the copyrighted work, it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, even if it is for the purpose of thereby better preserving their property rights. . . ." 80 F. Supp. at 893
>
> "The combination of the members of Ascap in transferring all their non-dramatic performing rights to Ascap, is a combination in restraint of interstate trade and commerce, which is prohibited by § 1 of the anti-trust laws. It restrains competition among the members of Ascap in marketing the performing rights of their copyrighted works. . . ." *Id.* at 894.
>
> "By pooling their rights and pooling the license fees derived therefrom, each in some way shares in the copyrighted work of the others. This has all the evils of 'block booking' . . . ." *Id.* at 895.

Among other relief, the court enjoined ASCAP and its members from licensing exhibitors and ordered that performance rights be licensed to motion picture producers (covering exhibitors' performances) at the same time synchronization rights were licensed to producers (*id.* at 902-03). Moreover, the court, noting the assertion that an injunction against ASCAP's licensing of exhibitors would place them and producers "in an obviously impossible bargaining position" with respect to music-in-the-can, also enjoined ASCAP and its members from enforcing their copyrights as to such performances (*id.* at 903-05)—*i.e.*, an effective forfeiture of those rights.

As to a more extensive order of divestiture, the court observed "that there are now two government suits against ASCAP in this Court, in which the government itself may seek to have ASCAP dissolved as an illegal combination" (*id.* at 903-04).

In addition to the 1941 suit, the court's reference was to an action the government had commenced about a year earlier (June 1947), charging ASCAP with having conspired with foreign licensing organizations "to restrain and to monopolize interstate and foreign trade and commerce in musical performance rights" (Complaint, paras. 3, 13). On March 15, 1950, a consent decree was entered in that case, *United States* v. *ASCAP*, 1950-51 Trade Cas. ¶ 62,594 (S.D.N.Y. 1950), enjoining ASCAP from combining with other licensing organizations for the purpose or effect of "allocating or restricting territories or eliminating competition among societies," from holding or enforcing "any rights in copyrighted musical compositions other than musical performing rights on a nonexclusive basis," and from interfering with its members' right to license directly (*id.* at 63,748-49) (referred to by ASCAP in the present case as the "retained right" (ASCAP Br. 8)).

Also on March 15, 1950, the 1941 decree was supplanted by a new consent judgment, *United States* v.

ASCAP, 1950-51 Trade Cas. ¶ 62,595 (S.D.N.Y. 1950) (hereinafter referred to as "the 1950 decree"), which restated the last two provisions (referred to immediately above) of the decree entered in the 1947 suit, and largely adopted the decree in *Alden-Rochelle* with respect to licensing in the motion picture industry. Additionally, the 1950 decree basically applied the radio licensing provisions of the 1941 decree to television networks and stations and, for the first time, made provision for the court to determine "a reasonable fee" for an ASCAP license upon application of the broadcaster (1950-51 Trade Cas. at 63,754 (sec. IX)).

Although involving another organization, and while dismissing the complaint for lack of standing, the decision in *Affiliated Music Enterprises, Inc.* v. *SESAC, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd on other grounds*, 268 F.2d 13 (2d. Cir), *cert. denied*, 361 U.S. 831 (1959), represented a subsequent judicial declaration that blanket licensing, substantively identical to ASCAP's practices, constituted a *per se* violation of Section 1:

> "[D]efendant's affiliation agreement is the classic pooling of rights and sharing of revenue struck down as violative of Section 1 of the Sherman Act in Alden-Rochelle, Inc. v. A.S.C.A.P., D.C., 80 F. Supp. 888, and Witmark & Sons v. Jensen, D.C., 80 F. Supp. 843. Irrespective of the amount of trade or commerce, this type of contract has been held to constitute an unlawful restraint of trade because . . . it cuts off competition among the affiliated copyright owners to market and exploit their works since they agree on a fixed price and share in the common profits . . . .
>
> "It is true that the Alden and Witmark cases also involved a monopoly finding, but the holdings are clear that pooling agreements are *per se* violations of the antitrust laws." 160 F. Supp. at 875.

ASCAP's first star in an otherwise bleak constellation of adverse antitrust rulings was the decision in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). There, several ASCAP publishers brought an action for copyright infringement against a radio broadcaster which defended by asserting that ASCAP's price-fixing and commission of other antitrust violations constituted copyright misuse, as did ASCAP's failure to comply with a Washington statute requiring it to issue per-piece licenses and file a schedule of per-piece rates. The broadcaster also counterclaimed for treble damages and injunctive relief.

The trial court, in an unreported decision, held the copyrights infringed, and the defense and counterclaims insufficient. The Ninth Circuit affirmed, holding that "ASCAP has been 'disinfected' by the decree" (*id.* at 4). The court's analysis will be treated more fully below (*see* pp. 53-61, *infra*). Suffice it to say here that, on the certiorari petition,* the Solicitor General nowhere endorsed the reasoning of that decision, but only the "result"—and approved that solely "[i]n the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions" (Dep't. App. 7a; JA 124). As to that market, the brief stated,

> "If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them. . . ." Dep't. App. at 9a; JA 127-8.

As to how the Department would view such common-sales-agency licensing in markets where no such necessity

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*The United States' *amicus* brief on that petition is reprinted in the Joint Appendix at JA 115, and as an appendix to the Department's *amicus* brief here.

exists, the brief contained at least three statements of significance:

> "Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. . . . Dep't App. at 8a, JA 124.
>
> "If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. . . . Dep't. App. at 12a; JA 130.
>
> "Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. . . ." *Ibid.*

In a subsequent case, where ASCAP's collective licensing had in fact gone "further than necessary" to preserve the market, the Justice Department flatly maintained that that practice was price-fixing and "a *per se* antitrust violation." The occasion for that statement was an NBC consent decree application for what it styled a "limited repertory" (or "nucleus") license to 2,217 songs (basically "standards" which NBC had determined were the principal published compositions used on its programs and recorded in motion pictures). ASCAP opposed the application, claiming that no such license was available under its decree, and

> "[T]he license sought would itself constitute an anti-trust violation because it would enable NBC

> through its 200 affiliated stations, to 'pitch the might of the NBC television network' against unprotected individual composers, who would have to knuckle under to NBC's terms in order to have their songs performed on the air."* *United States* v. *ASCAP* (*Application of National Broadcasting Co.*), 1971 Trade Cas. ¶ 73,491, at 90,009 (S.D.N.Y. 1971).

Judge Ryan dismissed the application on both those grounds (*id.* at 90,010), and, on appeal to the Second Circuit, the Department stated,

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar

*ASCAP talks frequently of "unprotected individual composers" as if it were the composers, rather than music publishing corporations which represent them, that actually engage in licensing transactions (in those markets not preempted by the ASCAP cartel) or would conduct them in a direct-licensing market here. It is therefore not surprising that two *amici* briefs have been filed on behalf of writers, whereas none speaks of the size or significance of the music publishing corporations involved. In fact, most of the major music publishing corporations are members of conglomerate families such as Warner Brothers, Gulf & Western and MCA, which are as large or larger than CBS, and, in a competitive market, would be dealing directly with program packagers which are either movie companies themselves or small independents (*see* pp. 19, 143 *infra*).

What the above-quoted ASCAP argument does imply (and what many others in this record make clear—*see* pp. 25, 95-97, *infra*) is that the principal purpose of this system is not the monitoring of unlicensed performances, but the exaction of monopoly rent.

concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)." NBC App. 15a.*

D. The Music Publishing Industry.

The heart of the music publishing industry is, of course, the statutory monopoly (copyright) protecting original music compositions. By law, copyrights are granted to the composers and lyricists of such works; by invariable practice, they are assigned to music publishing corporations which agree to promote and commercially exploit the copyrighted songs and divide the royalties with the writers (Pet. App. 9a n.13, 70a-73a).**

All significant music publishing corporations are members, through different subsidiary corporations, of both ASCAP and BMI. Since each writer can become a member of only one such organization, the music publishing corporations require membership in both in order to acquire titles to the music created by both ASCAP and BMI writers. [E 6-7 (para. 17); Cramer Tr. 4282]

Although there are literally thousands of music publishing corporations (some 6,000 in ASCAP and approximately 10,000 in BMI (Pet. App. 26a-27a)), those numbers are misleading. All or virtually all large publishing corporations are members of corporate families (commonly known as "publishing groups") consisting of many

*After the briefing of that appeal, the case was settled (*see* NBC's *amicus* brief on the present appeal).

**Under the ASCAP distribution system, 50% of all distributable royalties go to music publishing corporations (Pet. App. 11a n.15). While writers are free to contract with publishers to obtain part of the publishers' share, there must be some publisher entity to which the copyright has been assigned in order for the use of the music to receive a publisher distribution (E 115).

subsidiary and affiliated corporations. For example, Shapiro, Bernstein & Co., Inc., is a group of 14 corporations, nine members of ASCAP and five affiliates of BMI. There is also a substantial gap between the identifiably large publishing groups and others (*e.g.*, the top 14 ASCAP publishing groups account for more than 60% of total ASCAP distributions, while none of the remaining ASCAP publishers receive any substantial share of those distributions). [E 660; PX's 94, 416; AX 160]

Many of the largest music publishing corporations are themselves subsidiaries of corporate conglomerates—*e.g.*, Warner Communications, MCA (Universal), Gulf & Western (Paramount), Transamerica (United Artists), Disney, Twentieth-Century Fox, Polydor (a Dutch conglomerate which controls Chappell Music) and EMI (an English conglomerate which owns Capitol Records and Screen Gems). As is evident, many of those corporations are in the motion picture production business and they have stocked the catalogs of their music publishing subsidiaries with compositions originally written for films (Dean Tr. 1812; Chiantia Tr. 2859-60). Still other music publishing corporations have specialized in Broadway show tunes, such as Chappell and E. M. Morris (Dean Tr. 1812). Some publishing corporations are known principally for currently popular music (*e.g.*, Maclen Music Inc.) and others for particular types of compositions, such as classical works (*e.g.*, Boosey & Hawkes, Theodore Presser and Shawnee Press), country and western (*e.g.*, Hill and Range Songs, Inc.), etc.

In all fields not occupied by ASCAP and BMI—which includes the licensing of (1) print rights to sheet music publishers, (2) mechanical rights to phonograph record companies and background music services (*e.g.*, 3M), (3) transcription rights to wired music companies (*e.g.*, Muzak), (4) performance and synch rights to motion picture companies, and (5) synch rights to television

program producers*—licensing is done directly (between user and music publishing corporation) and through the clearinghouse maintained by the Harry Fox Agency, Inc.

The Fox Agency was established in the 1930's by the Music Publishers Protective Association ("MPPA"), now known as the National Music Publishers Association ("NMPA"), to act as an agent for music publishing corporations in their dealings with manufacturers of phonograph records and electrical transcriptions and, with respect to synch rights, with the producers of theatrical motion pictures. When, in the aftermath of *Alden-Rochelle*, movie companies began licensing both performance and synch rights directly, the music publishing corporations caused the Fox Agency to augment its facilities for that field. Also in the 1950's, Fox moved into the television synch rights area with the advent of filmed (as distinguished from live) programs.** [Pet. App. 73a; Berman Tr. 772, 822-27].

*For television network purposes, synchronization rights licenses are not required for all programs. By definition, they are unnecessary for live programs (such as sports and public affairs); and by virtue of an agreement (sometimes referred to as the "Kinescope Letter") made in the 1950's between the networks and ASCAP and BMI (based on an undertaking ASCAP and BMI obtained from their members), they need not be secured for the initial network run of Kinescoped or taped programs (which were analogized to live programming). [E 898, 1040-41; Berman Tr. 982-83]

**The licensing of television synch rights—either directly or through Fox—was initially complicated by the standard form of agreement which publishers had executed with writer members of the Songwriters Protective Association ("SPA"), now known as the American Guild of Authors and Composers ("AGAC"). (AGAC's membership comprises approximately 3,000 writers of music, including substantially all of the authors and composers of the "standard" compositions. An indication of the position of its membership in this industry is afforded by the fact that AGAC writers own rights to approximately 46% of the compositions in the ASCAP Performed Works Index.) [E 433 (para. 4k); PX's 429, 461]

Under AGAC's minimum basic contract, publishers are prohibited from licensing music for television use without writers' consent. (In the case of performance rights, that prohibition is unqualified; in the case of synch rights, it is limited to compositions more than ten years old.) In 1959, AGAC learned that many music publishing companies had been issuing synchronization rights licenses to television producers in the absence of such consent and demanded, by form letter, that they cease that activity. A number of the publishers protested that the shortness of time within which television producers had to obtain these rights and the difficulties of seeking writers' consent made compliance with AGAC's demands impractical. The problem was resolved in this fashion: publishers and their AGAC-writers executed addenda to their form contracts setting forth a schedule of minimum synchronization rights fees, and AGAC agreed to waive the condition of writer consent to each individual synchronization rights transaction, so long as publishers did not charge less than those scheduled prices. [Pet. App. 70-71; E 433 (para. 4k); 440, 488-90, 1230; Lane Tr. 1076-77]

For the most part, Fox is under instructions to issue licenses at minimum-fee-schedule prices, without the necessity of first checking with publishers, so that each transaction generally requires a single call by the producer or his agent to Fox. [Pet. App. 67a]

When Mr. Fox died in 1969, the Agency was incorporated as a wholly owned subsidiary of the NMPA. The NMPA still owns 100% of the shares of the Fox Agency, and four of its officers, Messrs. Brettler (Executive V.P., Shapiro, Bernstein & Co.), Chiantia (Pres., MCA Music), Shulman (V.P., Belwin-Mills Publishing Corp.) and Shayne (Pres., Larry Shayne Music, Inc.), comprise the Fox Board, as well as sit on the ASCAP Board. [Berman Tr. 771-74]

The typical Fox Agency movie or mechanical rights transaction begins with a telephone call or letter to the agency in which the film or record producer seeks price quotations on various compositions which he may select for use in a forthcoming production. The Fox staff is able quickly to ascertain which music publishing corporations own the compositions in question, because the publishers are assiduous in supplying Fox with their current catalogs of songs with which the agency updates its own card catalog. The Fox employee then calls a representative of each music publishing corporation in interest, receives a price quotation and calls the user to relay that information.

In either that conversation or in subsequent telephone conversations, the price is established and the deal made. Fox then sends a contract (typically the music publishing corporation's standard form of license) to the user and ordinarily bills the user, collects the fee and remits it to the publisher after deducting a commission, typically of 5% or less which covers the full Fox expenses.* [Pet. App. 67a-68a; Berman Tr. 829-831; Mingle Tr. 854, 865-66]

Straight direct licensing transactions are conducted in essentially the same manner, except that users negotiate price directly with representatives of music publishing corporations. Either in that type of transaction or in those handled by Fox, users frequently "shop around," in the sense of requesting price quotations on a number of compositions for any one projected use; but, in all events, the general recognition that users may reject quotations they believe to be too high and substitute lower priced music engenders substantial price competition (Mingle Tr. 858-60; Brettler D 258-60).**

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*The Harry Fox Agency commission, on mechanical rights licenses, is 3¼% for publishers whose gross receipts from such licenses are in excess of $25,000 per year, and 4½% for other publishers (Berman Tr. 837-38). Mr. Albert Berman, Managing Director of the Fox Agency, explained that these fees were reduced from 3½% and 5% respectively, because he found that "our costs were less than our income" (Tr. 838). Fox issues approximately 60,000 mechanical rights licenses per year for which publishers receive approximately $45,000,000 in fees (Berman Tr. 829, 833).

For the several hundred yearly movie rights licenses, Fox charges a 10% commission on a synchronization rights license and 5% for a performance rights license, with a maximum fee (which applies in most cases) of $150 (Berman Tr. 844-45; Mingle Tr. 854, 858). Since license fees for movie rights typically range from $750 to $20,000 (Mingle Tr. 869-70), the effective commission is substantially less than the 10% and 5% charge, and at times is under 1%.

Fox charges a 10% commission on television synchronization rights licenses (Berman Tr. 920). Since, with rare exceptions, the price range of such licenses is $50 to $150, Fox normally collects between $5 and $15 for its services (Berman Tr. 927).

**Prior to the recent amendments, the effect of the Copyright Law was to limit mechanical rights license fees to a maximum of 2¢ per song, per record sold (now 2¼¢). At and below that 2¢ ceiling, however, considerable price competition occurred, particularly in the area of mechanical rights licensed for "specialty" records (such as the "premium" records offered in connection with advertising campaigns, or the so-called "broadcast package" records which are compilations of prior years' "hit" recordings). Twenty to twenty-five percent of all mechanical rights licenses were issued at prices less than the 2¢ rate. [Berman Tr. 831-37; Chiantia Tr. 2940-41; Shulman Tr. 3081]

Each such user, therefore, "buys" in a competitive market, whether it deals through Fox or negotiates directly with the representative of the music publishing corporation.

Indeed, the only service performed by Fox, so far as the user is concerned, is to be able to identify almost immediately each publisher which owns each composition in which the user is interested (Berman Tr. 779-80, 799-802; Mingle Tr. 858-60)—a service that each user could perform for itself if it had a full set of major publisher catalogs (Pet. App. 70a), or, of course, had access to each updated version of the ASCAP and BMI indices of performed works, which contain the same information (Marks Tr. 2431-33; PX's 579-80).

E. Blanket Licensing by ASCAP and BMI.

ASCAP and BMI license only performance rights (Pet. App. 2a). They license all users of such rights,* except motion picture production companies, and they license only on a blanket basis (Pet. App. 5a-7a).

The blanket license ASCAP and BMI offer television networks, including CBS, contains the following principal provisions:

(a) The network receives the right to use the entire ASCAP (or BMI) pool.

(b) For that right, the network pays a flat fee or fixed percentage of its income, which fee does not vary

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E.g., television networks and stations, radio networks and stations, wired and background music services, theaters (other than movie theaters), concert halls, night clubs, restaurants, bars and skating rinks (Pet. App. 2a n.3; Marks Tr. 2418-19).

in relation to the nature or quantity of the uses the network makes of ASCAP (or BMI) music during the license term.

(c) Moreover, that fee remains constant irrespective of any direct licenses obtained by the network or program packagers from ASCAP (or BMI) members—thus, for the network to obtain direct licenses would result in the network paying twice for the same rights.* [Pet. App. 3a, 6a-7a; E 888, 907; Sipes Tr. 25; Fisher Tr. 1652-53, 1684; Nathan Tr. 4011-12; Finkelstein D 610-613]

Although networks (and other users) have the right, under the ASCAP decree, to apply to the district court for the setting of a "reasonable" fee for an ASCAP license, and while many such applications have been made, the court has never had occasion to determine license fees, since all such proceedings have been concluded by negotiated settlements (Pet. App. 7a, 30a-31a, 51a, 53a; Finkelstein Tr. 3805-06). From 1962 to 1969, the yearly fee CBS paid ASCAP for a blanket license increased from $3,572,000 to $5,680,000.** From the commencement of

*Under their respective consent decrees, ASCAP and BMI are also required, upon a broadcaster's request, to issue a blanket license under which the fee is paid on each program using that organization's music, rather than on an annual basis (hereinafter referred to as a "per-program" license); but all commercial television networks and, with *de minimis* exceptions, all commercial television stations in the United States have held and now hold standard ASCAP and BMI blanket licenses (Pet. App. 6a-7a). As the court of appeals stated,

> "Under the per program license, once there is any use, the amount of use is irrelevant. It does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same.
>
> "The utility of the per program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming." Pet. App. 7a n.9.

**The district court found that CBS's "cost for ASCAP or BMI music runs about $1,000 per program" (Pet. App. 29a). That finding is based on the same statistical fallacy (adopted from defendants' post-trial papers) that discredits other data set forth in the opinion (Pet. App. 60a-61a) and is extremely misleading. For included in the number of CBS programs cited by the court to arrive at the $1,000 average cost are more than 1,000 CBS news and sustaining programs which do not use any music and many hundreds of five-minute children's educational programs which use little or no music. Hence, the actual "average" fee for programs using substantial quantities of music is many times that $1,000 figure. [PX's 540-46, 838; AX 287]

this lawsuit on December 31, 1969, through March 30, 1978, CBS had been operating under an interim license provided for by the ASCAP decree.* [Pet. App. 29a; E 5 (para. 10), 124, 907]

In 1969, CBS paid BMI $1,607,114 for a blanket license; that amount was set by the court in this case as an interim fee (320 F. Supp. at 389, 395); and that fee was later raised to $1,700,000, subject to retroactive readjustment "to reflect the determination of the case on the merits" (Stipulation and Order entered on September 25, 1972, (para. 4)).

F. Monitoring and the ASCAP/BMI Distribution Systems.

ASCAP monitors users' music performances for two reasons: it monitors unlicensed users for purposes of detecting infringements and prosecuting infringement suits (in the names of the music publishing corporations in interest); it monitors licensed users for purposes of its distribution system (Pet. App. 27a; E 441; Chiantia D 295). The former (sometimes called "policing") function is frequently cited by ASCAP as the principal reason for its formation (*e.g.* ASCAP Br. 6). It is, on the other hand, the latter function on which ASCAP predominantly expends its funds (E 254).

Monitoring for distribution purposes is a "big and complex" job (E 228)—and the biggest and most complex part of it is the monitoring of television network performances. Surveys of other licensed users (*e.g.*, television stations, radio stations and wired music services) are done

*In an unfounded attempt to arouse emotional appeal for its position, ASCAP suggests that CBS seeks to pay nothing to ASCAP members for music used since that date (Br. 14 n.). The contrary is true, and ASCAP has good reason to know that (see note at 31 of our Brief in Opposition to the certiorari petitions).

on a sampling basis. With respect to television networks, ASCAP audits and records the pertinent data concerning every single network use. [E 221-224; Marks Tr. 2254-58, 2460-65a, 2469-72, 2477]

Pursuant to the terms of the license, each network, including CBS, is obligated to provide ASCAP with music logs (or, in the case of theatrical motion pictures, cue sheets) which in practice set forth, with respect to each program, the titles of the compositions used, the names of the writers and publishers of those songs and the nature of each use (feature, theme or background). Additionally, ASCAP makes an audio tape of selected weeks of network programs and ASCAP "listeners" check those tapes against the music logs and cue sheets. After performing various other checks for accuracy, ASCAP enters the log and cue sheet information into its computer system which has been programmed to determine the numbers of ASCAP "credits" assigned to each network use. [E 247-48, 498, 1048-49; Marks Tr. 2469-73, 2484; Poklitar Tr. 2060-64]

Under ASCAP's distribution formulae, different credit values are assigned to different types of music usage, based on such factors as categories of performance (feature, theme or background) and the economic status of users. In accordance with those formulae, each ASCAP member receives a prescribed number of credits in respect of each performance picked up in the survey. At the end of a distribution period, ASCAP's total distributable revenues are split into equal writer and publisher segments; total writer credits are divided into total writer distributable revenues to produce a cash value for each writer credit; and the same process is applied to the publisher half of the revenues to produce a dollar value for each publisher credit. On distribution, each publisher member and each writer member electing to receive distributions on a current performance basis receives an amount equal to the number of credits it (he) has earned

times the cash value of each credit. [Pet. App 11a, n.15; E 139, 141, 243-44; Marks Tr. 2482-84, 2498, 2500-09]

Writers also have the option of receiving distributions under a four-fund plan which has the effect of deferring part of their income and compensating them additionally for longevity of membership and the recognized status of their works (Pet. App. 11a, n.15; E 139; Fisher Tr. 1761-63).

For 1972, the most recent year for which financial information was introduced into evidence at trial, ASCAP's total licensing revenues were $68,306,610, and its expenses were in excess of 21 percent of that total (*i.e.*, $14,459,589) (AX 232). Of those expenses, at least $2,648,177 can be assigned on the face of the annual report to the ASCAP distribution system (*ibid.*).* Since television network uses are monitored on a census (rather than a sample) basis, it is likely that a disproportionately high percentage of those expenses is attributable to the job of distributing network revenues.

BMI largely duplicates those expenses. Like ASCAP, BMI surveys television network uses on a census basis and other broadcast uses on a sampling basis. Duplicates of the music logs and cue sheets that CBS (and other networks) send to ASCAP are sent to BMI; and BMI enters that information (as well as the data compiled on other surveyed users) into its own computer system. [E 649; Poklitar 2060-62; Cramer 4255a-56]

In lieu of distribution formulae, BMI offers certain payment schedules, under which writer and publisher affiliates receive stipulated amounts for each broadcast use of their music picked up in the BMI survey. Those amounts vary depending upon the identity of the user (TV network, radio network, TV station, radio station), the nature of the song (*e.g.*, movie and Broadway show music, popular song), the nature of the use (feature,

*Some portion of the $5,791,116 listed in that annual report as "administrative and operating" is presumably indirect expenses attributable to ASCAP's distribution system.

theme or background), the duration of the use (in the case of background uses), and, in respect of television uses, the time of day of the performance (prime time or daytime). Additionally, BMI offers many of its affiliates bonuses and guaranteed "advances." [E 563, 570]

G. Direct Licensing of Music Performance Rights for Television Network Use.

In the absence of ASCAP and BMI, the prices paid by networks to independent packagers for finished programs would include payment for music performance rights, as they now include payment for all other program rights and elements. Thus, the packagers would license music performance rights directly, and in a competitive market, which is the way they now license or purchase everything else, and license music when they are producing theatrical motion pictures instead of television programs. [E 10 (para. 37); Sipes Tr. 65-67; Wright Tr. 408-20, 435-36; Vincent Tr. 584-98; Sunga Tr. 738-51; Mingle Tr. 858-59]

The present blanket licensing system is also aberrant in another sense of economic significance. When the same economic entity (here, the packager) which selects the commodities or rights (here, music) must also pay for them (which would be true in a direct-licensing system, but is not under the present blanket system), a more efficient allocation of resources is achieved (*i.e.*, would be here, by competition among various categories of music, and between music and other program elements•). [Fisher Tr. 1667-70, 1682-83; Nathan 4022]

Packagers now use essentially two types of music: that written especially for the program (*e.g.*, theme, background and occasional feature music) and previously

•*See* Point IV below, for a more complete discussion of that resource allocation point.

published compositions (Pet. App. 9a, 56a-57a). With respect to the former, packagers now deal directly with the composers, paying them salaries for creating the music and fees for the synchronization rights (Pet. App. 9a, 57a-58a). In a direct-licensing system, the transaction would obviously include the performance rights as well (Pet. App. 9a, 58a-59a) (and the ASCAP or BMI overhead expense, now incurred in transferring to the writer that portion of the network blanket fee attributed to the network use of his music, would be saved).

To give packagers speedy access to previously published music, each television network would be likely to maintain, probably in machine-processible form, a file of song titles equivalent to the Fox Agency card catalog or the ASCAP Index of Performed Works (which would also list the names and telephone numbers of the employees or agents of the music publishing corporations in interest authorized to deal in performance rights). When each producer made his tentative selection of compositions, he would call the network custodian of that file, receive a list of the pertinent names and phone numbers, call them, and negotiate fees. [Sipes Tr. 68-72]

The music publishing corporations would, of course, have to incur appreciable start-up costs in order to develop the facilities for such direct-licensing transactions.• They already possess such facilities for the licensing of movie

•Thus, in the first instance, each publisher would have to review all its contracts with its writers to determine which of the compositions in its catalog would require writer consent to direct licensing transactions (Finkelstein Tr. 3723-25; Brettler D 127-31; Herman D 640; Morris D 663-66, 700; Brackman D 109-10). Each major publisher is likely to have thousands of compositions in that category (Shapiro, Bernstein alone has contracts with some 600 to 700 AGAC writers) and those compositions are likely to be among the most important music in its repertory (E 430; Brettler D 125-26; Chiantia D 266-69; Coleman D 339-44; Morris D 663). For, apart from the AGAC writers, who include the most prominent composers and lyricists of popular works, the only writers to whom publishers will offer such terms are those with sufficient bargaining power to command them

performance/synch rights, mechanical rights, print rights and others (and to enter into any field it is generally necessary for sellers to incur start-up costs). On the other hand, once those start-up costs *are* incurred, continuing transactional expenses should be negligible (certainly no more than the transactional expenses of the movie performance/synch rights deal which is more complex) (Pet. App. 74a-76a).

Moreover, direct licensing of network uses would obviate the need for the present elaborate ASCAP and BMI distribution systems *vis-a-vis* network uses, and thus eliminate the immense cost of maintaining those duplicative systems. It is questionable whether there would be any need for monitoring network uses at all (Berman Tr. 931-33); the Fox Agency does not monitor theatrical motion pictures, since, as Miss Mingle (the Fox employee responsible for that job) testified, "[t]he penalties are too high and a good producer or distributing company knows it" (Mingle Tr. 884-85).

(Chiantia Tr. 2979; Brettler D 131; Chiantia D 266-69; Coleman D 339-44; Morris D 663-64, 742-43).

The publishers would then have to communicate with all those writers for the purpose of explaining to them the necessity of obtaining their consents; terms would have to be negotiated; and amendments to their existing contracts signed. Publishers would have to train existing personnel or hire and train others competent to negotiate direct licenses or they would have to retain agents for that purpose (JA 354-57; Brettler D 164-76). Each publisher would then have to send to the television network the name, address and telephone number of the person authorized to issue direct licenses, a current list of its songs, together with pricing and ownership information (*e.g.*, information regarding split copyrights), and, of course, keep that information current with follow-up notices of any changes.

The publishers might also want to develop contract forms for direct licensing transactions, and perhaps consult attorneys for the purpose (Nathan Tr. 4078; Brettler D 165-67, 195-96, 261-62; Morris D 700-02). Additionally, publishers would have to spend some time learning the norms and patterns of market prices and forms of transactions so as to enable them to make sensible decisions in the marketplace (Fisher Tr. 1684-85; Berman Tr. 949-50; Brettler D 197-98).

At most, some spot-check monitoring might be done for the purpose of detecting infringements, and that function could be performed, if thought desirable, by publishers jointly—either through ASCAP or some other organization formed for the purpose (Fagan D 430-32).

Thus, ASCAP's or BMI's monitoring function is quite separable from their licensing function and would be sharply reduced in scope and expense if that separation were made. The best indication obtainable of the magnitude of potential savings is provided by comparison between the present ASCAP overhead of 21% of revenues and the Fox overhead of less than 5%.*

H. Barriers to a Bypass.

There are at least three reasons why motion picture production companies could bypass ASCAP in the 1950's and television networks (despite the clear desirability of such a course) could not do so then or now.**

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*The Fox overhead covers negotiation and billing services (*see* note at 22 *supra*.). Since publishers normally spend some time on the telephone with Fox employees regarding each licensing transaction (Pet. App. 68a), that time would have to be added to the less-than-5% figure to complete the comparison.

**In addition to the reasons common to ASCAP and BMI, it should be noted that BMI affiliates grant it the "exclusive" right to license performance rights to all users other than motion picture production companies (JA 65 (para. 5);E 544, 548, 553, 557). BMI claims that Paragraph IV(A) of its 1966 consent decree "requires that BMI permit its affiliated writers and publishers to issue performance licenses directly to music users" (Br. 6-7)—but that is plainly wrong. The paragraph referred to requires such permission only with respect "to a music user making direct performances to the public".

The phrase "direct performances to the public" is meant to encompass performances before live audiences (as BMI's president, Edward Gramer, testified in a deposition taken in *BMI* v. *NBC* (70 Civ. 1785 S.D.N.Y.), "I would just say, if I were asked what a direct performance would be, I mean, if somebody stood up in front of an audience and sang a song" (E 632)). he phrase obviously excludes performances electronically transmitted, such as on television networks. If it did not, all performances would be "direct performances to the public" and the phrase would be meaningless.

(footnote continued on next page)

First, the decree entered in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900, 902-03 (S.D.N.Y. 1948)

Moreover, if BMI actually believed that there were any exception to its exclusivity that broad, its standard form of affiliation agreement would not have continued to have recited, as it has for the 12 years following the entry of its decree, that its rights to license are "exclusive" (E 544, 548, 553, 557).

The district court below concluded that BMI's rights should be treated as "non-exclusive," not because of its consent decree, but because of a stipulation between BMI and CBS (Pet. App. 32a-33a; E 388-89) that had nothing whatever to do with the exclusivity question. The parties simply agreed in that stipulation that any determination made by the court regarding the issue (as between CBS and ASCAP) of the "*practicability*" of direct licensing would be applied to any such question as between CBS and BMI. For at that point, "practicability" had been put in issue by defendants' contention of what amounted to a market-functioning-necessity position (advocated by the Solicitor General's *amicus* brief in *K-91–see* pp. 15-16, *supra*); and the ability of the market to function on a direct-licensing basis (*i.e.*, the inherent practicability of direct licensing, once present barriers were overcome) was pertinent to BMI *irrespective* of its exclusivity. Moreover, ASCAP had also asserted (though totally inconsistent with a market-functioning-necessity position) that its fixing of prices was exempt from Section 1 because CBS could now bypass ASCAP and fill its music requirements by direct licensing. Although that contention had no immediate applicability to BMI, in the light of BMI's exclusivity, it would have in the event that BMI voluntarily waived the exclusivity of its licensing rights (in view of the flagrant illegality of an exclusive joint sales agency system) or was prohibited by final order from maintaining exclusive rights. The latter was a distinct possibility; but if it occurred after a full trial on the merits, and the court had ruled that CBS could obtain complete relief against ASCAP only because of the present "impracticability" of CBS's dealing directly with ASCAP members, CBS (in the absence of a stipulation with BMI) would have had to undergo another trial in which the "practicability" question could be determined as between CBS and BMI. The stipulation removed any such contingency and obviated the extra discovery that would otherwise have had to have been conducted to guard against it.

Although the district court gave no explanation how a stipulation regarding "practicability" could transform "exclusivity" into "non-exclusivity," the apparent assumption was that the stipulation would not have been entered into unless non-exclusivity were conceded. Since there was no basis for any such assumption—indeed, as just discussed the facts are otherwise—the court's interpretation was clearly erroneous. Moreover, since BMI's actual exclusivity represents a legal status, which a stipulation of fact should not be deemed to alter, the ruling was erroneous on that ground as well. *Swift & Co.* v. *Hocking Valley Ry.* 243 U.S. 281, 289 (1917).

(two opinions) enjoined ASCAP and its members from enforcing rights as to music-in-the-can. It was thus a straightforward, complete solution to the music-in-the-can problem insofar as film producers were concerned.

In contrast, CBS has, at any given time, an inventory of films and programs worth $100 million or more, containing in their sound tracks many thousands of performances of copyrighted music,* covered by ASCAP (and BMI) blanket licenses, but otherwise unlicensed (Pet. App. 10a n.14; Sipes Tr. 52-53). Additionally, the entire world's stock of motion pictures and programs also contains such recorded performances. If CBS abandoned its blanket licenses, both its present inventory of films and those it sought to obtain in the future would be unusable unless direct licenses to such music could be transacted. The leverage thus afforded copyright proprietors would place the network, as noted in *Alden-Rochelle* (as to an analogous situation), "in an obviously impossible bargaining position" (80 F. Supp. at 903-04).**

Second, the major film producers were, in effect, bypassing their own cartel and, of course, had the

*As of March 31, 1973, the date selected by the court for determining the size of this inventory (PX 995 (paras. 1-2)), the theatrical motion pictures alone contained more than 13,000 performances of copyrighted musical compositions (PX 994).

**The district court's finding that the music-in-the-can problem would not rise to the level of concerted "hold-ups" by copyright proprietors (in the nature of a boycott) (Pet. App. 103a-04a) is beside the point, as is recognized by the Department's brief on this appeal (Br. 25, n.23). Economists for both sides substantiated the material proposition that it would inflate price (Fisher Tr. 1686-87, 4805-08; Nathan Tr. 3903, 4052). BMI maintained in its trial memorandum that the music-in-the-can situation would give the copyright proprietor "the power to name his price"; would "result in occasions on which CBS will be unable to use finished material without paying very large sums for performance rights"; and would pose a situation which "CBS would find . . . intolerable" (JA 354; Cramer Tr. 4317-18). Indeed, the point is too obvious to require extended discussion.

economic incentive to do so. The music publishing corporation subsidiaries of these motion picture companies controlled ASCAP (receiving 74% of ASCAP publisher distributions, as noted by the court in *Alden-Rochelle*, 80 F. Supp. at 892), and had themselves contrived the scheme of exacting royalties from exhibitors by obtaining only synchronization rights and compelling exhibitors by threats of infringement prosecutions to accept ASCAP blanket licenses (*ibid*). Once the publishers were enjoined from suing exhibitors for infringement (both by the *Alden-Rochelle* decree, *id*. at 903-04, and the 1950 consent decree, *United States* v. *ASCAP*, 1950-51 Trade Cas. at 63,754 (sec. IX)), and were thus compelled to license performance and synch rights at the same time, it obviously made more sense for them to do so directly, than circuitously through ASCAP.

And, third, other music publishing corporations, recognizing that *Alden-Rochelle* had effectively terminated blanket licensing of performance rights for motion picture use, had no alternative but to develop the requisite direct-licensing facilities (Berman Tr. 824-27).

In contrast, a television network attempting to bypass ASCAP, would be confronted with (1) a music publishing industry totally lacking the necessary facilities for directly licensing network uses (Pet. App. 66a; E 6 (para. 16)), (2) the manifest economic incentives of publishers not to spend their own money to create the facilities necessary for a bypass to succeed (*see* pp. 74-77, 122-26, *infra*.), and (3) neither the injunctive relief, nor the declaration of illegality, which, in *Alden-Rochelle*, overcame those hurdles.

The result, in the network market, is a vicious circle. So long as the television networks have blanket licenses, they and packagers are economically foreclosed from engaging in direct dealing, since direct dealing would involve paying twice for the same music. So long as there is no direct dealing, the normal market machinery

necessary to permit direct dealing will not arise. Indeed, so long as the present blanket system can be maintained, publishers and writers are insulated from the need to compete on a price basis; and their voluntary expenditure of the effort and money required to create direct-licensing facilities for the privilege of engaging in price competition would be a self-defeating course of conduct. So long as there is no market machinery for direct dealing by the networks, and no relief for the music-in-the-can problem, no single network can afford to forego its blanket license, since to do so would put it at a serious competitive disadvantage *vis-a-vis* the other networks.

None of this means that there is any inherent reason why this market cannot function on a direct-licensing basis (as well as it now competitively functions in the licensing of performance rights to motion picture companies). The music-in-the-can problem can be solved as it was in *Alden-Rochelle*, or (in a manner more generous to the music publishing corporations) by the licensing of such music at court set per-use rates geared to competitive price levels. The lack of facilities problem can be cured by an injunction against ASCAP fixing prices, which would leave the publishers with no choice but to create those facilities. In short, both barriers are quite removable by decree.

I. Prior Proceedings Pertinent to This Appeal.

On October 27, 1970, the district court granted BMI's motion for a preliminary injunction (320 F. Supp. 389 (S.D.N.Y. 1970)), compelling CBS to make blanket payments for the use of the BMI pool during the pendency of the action. Although CBS had argued, *inter alia*, that the *per se* illegality of price-fixing by BMI defendants was evident on the face of their affiliation agreement, the court held that CBS's "contention is necessarily far from demonstrated" and "presently insufficient to warrant the court's refusal to grant relief" (320 F. Supp. at 392-93).

On January 20, 1972, the court denied ASCAP's motion for summary judgment (337 F. Supp. 394), holding that there were material issues of fact to be tried with respect to whether ASCAP's activities, "which would otherwise be illegal *per se*" (*id.* at 400), could be justified on the ground that they were essential in order to permit the market (for the licensing of performance rights to television networks) to function. In that connection, the court noted the Solicitor General's *amicus* position in *K-91, Inc.* v. *Gershwin Publishing Corp.*, (quoted at pp. 15-16, *supra*), that such a market-functioning necessity was the basis for the regulatory system imposed by the 1950 ASCAP consent decree (as distinguished from an injunction dismantling the combination) and concluded on analogy to *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), that anticompetitive restraints could be tolerated only to the minimum extent necessary to serve "the purpose of maintaining an orderly market" (337 F. Supp. at 400). Without citation or analysis on the question of burden of proof, the court held:

> "[I]f CBS can prove that the regulatory system can be amended to operate on a more competitive basis [*i.e.*, permit competition to occur and still enable the market to function], it would by definition mean that the antitrust laws were being encroached upon more than to the 'minimum extent necessary.' " *Ibid.*

As further stated at the conclusion of the opinion:

> "We express no views at this point as to the feasibility of CBS' 'per-use' proposal [*i.e.*, one proposed 'amendment' to the 'regulatory system' to enable it to function on a more competitive basis] or whether a judicially determined fee is the economic equivalent of a fee fixed in the market

> place.[•] We hold only that genuine issues of material fact exist as to these questions and that CBS is entitled to prove its contentions at trial." *Id.* at 401.

There was notably absent from that decision any framing of an issue as to whether the publishers' "retained right" could be resorted to by networks, or whether, if it could, it meant that the ASCAP combination was somehow not fixing prices. On the contrary, the court branded ASCAP's activities as "price fixing" which would be "illegal *per se*" but for the possibility of a market-functioning necessity *(ibid.)* and mentioned, in passing,

> "[W]e are doubtful *in any event* of the practical value of the 'nonexclusive right' under the present system. We are inclined to agree with the court in Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322, 333 (1959). There Judge Weinfeld observed as to the argument that a user always has the 'option' to seek an individual license: 'The nonexclusive right allegedly retained by the plaintiffs [composers and authors] is more apparent than real.'[4]
>
> ". . .

> "[4]Furthermore, ASCAP's general counsel [Herman Finkelstein] has acknowledged in deposition the impracticability of a user's being able to fulfill its requirements for music by dealing directly with ASCAP members:
>
> "'Q. Let me ask you this. Is it true that large-scale users of copyrighted musical works

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•At trial the proposition that a judicially determined fee might be the "economic equivalent of a fee fixed in the market place" was given short shrift by ASCAP's own economic expert, Mr. Nathan (Tr. 3876-78) as well as CBS's, Professor Fisher (Tr. 1737-40). In fact, the point never became a genuine issue at trial because neither group of defendants was willing to attempt the affirmative of such a patently erroneous position.

would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?

"'A. I believe that would.

"'Q. Is [CBS] a large-scale user?

"'A. Oh, yes.' (HF Dep. 46-47)" 337 F. Supp. at 401 (emphasis added).*

By order dated June 12, 1972, the court directed that the issues as to defendants' liability be tried separately from, and prior to, issues concerning the nature and extent of the relief to be granted herein (Pet. App. 39a). But in then defining those liability issues for trial, the court set forth (over our vigorous objection**), in addition to the market-functioning question specified in the summary judgment decision, the issue of whether the present system "compelled" CBS to accept the ASCAP combination's fixed price (Pet. App. 39a).

*As noted earlier (p. 35, *supra*), and discussed at some length below (Point III), the present barriers to a bypass, which in Mr. Finkelstein's judgment made it "wholly impractical," are quite removable by decree, but not otherwise.

**The Department states that CBS argued only tying and "rule of reason" illegality to the district court, and then changed its "focus" to the court of appeals (Br. 12). That is both inaccurate and confused. We have argued that blanket licensing is price-fixing and illegal *per se* from the very outset of this suit, as defendants themselves have often acknowledged (JA 107, 189, 201-03, 270-72). As to our objection to the pretrial order referred to in the above text, see JA 382. The fact is that so vigorously did we stress the *per se* nature of this case that ASCAP objected to the very relentlessness of our position:

> "We object to CBS' proposed order because, like CBS' recent memorandum (dated April 11, 1972), its underlying premise is that this case is a *per se* case. . . ." (ASCAP Memorandum Re Proposed Order on Rule 42(b) Motion, May 5, 1972, p. 2)

Hence, there was no change of focus; our principal contention has always been that this system is unlawful *per se;* we have also asserted and proved its unreasonableness, as required by the district court's pretrial order; the unreasonableness contention was also advanced to the court of appeals; and, as we show later (at pp. 142-43), the court of appeals, in reality, decided this case on both grounds.

In its final opinion of September 22, 1975, the district court held, on the authority of the single-seller tying decisions, that a nationwide combination of sellers who market their product through a common-sales-agency device, could not be found to have engaged in price-fixing, in the light of the sellers' "retained right" to deal directly at "negotiated price[s] for each license," unless it could be shown that they "compelled" their customers to accept the common-sales-agency fixed price (Pet. App. 115a).

Neither Mr. Finkelstein nor any of his voluminous testimony admitting such "compulsion" was ever mentioned nor were other copious concessions of the same point (see Addendum D). And while the court itself held on summary judgment that the critical issue was whether "the regulatory system can be amended to operate on a more competitive basis" (337 F. Supp. at 400), it then stated, in its final opinion, that

> "CBS *now* takes the position that the primary question presented for determination is whether the present system can be amended to operate on a more competitive basis." Pet. App. 39a (emphasis added).*

Moreover, in the court's view, "compulsion" posed two issues involving propositions of a speculative and (in

*Indeed, the court indicated (and this is probably the basis for the Department's confusion about a supposed change of "focus") that CBS had presented this issue and the related *per se* point in a belated fashion:

> "Coming after an eight-week trial and the accumulation of a bulky, factual record, the timing of this contention is unusual." *Ibid.*

Not only had we previously urged these points in all substantive briefs written throughout this litigation, and not only had the district court acknowledged that we had done so on the summary judgment argument (337 F. Supp. at 397), but the court itself had stated in its summary judgment decision that ASCAP's activities would be "illegal *per se*" but for the possibility of a market-functioning necessity (*id.* at 401).

the absence of admissions) inherently unprovable nature—on which the court assigned the burden of proof to CBS. Hence, the court stated that it could find "compulsion" to exist in this case only if CBS could prove that filling its music performance rights requirements by direct licensing was "not a viable method" (Pet. App. 55a), in the sense that (a) publishers and writers would boycott CBS in the event it canceled its ASCAP and BMI blanket licenses, or (b) the transactional problems of direct licensing (given the present lack of direct-licensing facilities) would be insurmountable in the absence of judicial relief (Pet. App. 46a-47a, 50a). The court found that CBS had not proven either proposition, and indicated that CBS would be unable to do so unless and until it attempted a bypass in lieu of accepting the common-sales-agency price and "failed" in some measurable degree (Pet. App. 43a, 54a, 113a-14a).

The district court opinion did not explain how the "retained right" dislodged the fact that prices were being fixed on common-sales-agency transactions, or how it differed from rights retained by conspiring sellers in routine price-fixing or price-ceiling cases. It did not discuss the impact of a continuing common-sales-agency price on putative direct-licensing prices or the additional effect that would be exerted on such prices by the music publishing corporations' conceded antagonism to dealing outside of the cartel.

The court did make findings of fact which presupposed the threat of serious injury to any network attempting to bypass these cartels (*see* Point III. B., *infra*), but attached no legal significance to that point.

The court of appeals reversed on August 8, 1977, holding that defendants fix prices in violation of Section 1 of the Sherman Act and are guilty of copyright misuse. The bases for that decision are reviewed in Points I and VII below.

The court further held that CBS's claims of tying and monopolization were properly dismissed because "they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP blanket license" (Pet. App. 23a n.29) and "our review leads us to the conclusion that the essential finding of the district court that [a direct negotiation market] *can* exist is not clearly erroneous" (Pet. App. 10a).

As was true of the district court, therefore, the court of appeals did not consider whether the threats of injury entailed in a bypass attempt, which the district court's findings had effectively disclosed, were sufficient barriers in law to support tying and monopolization even though artificial, cartel-created, removable by decree and, therefore, not sufficient in fact ultimately to preclude the existence of a direct negotiation market.•

We therefore submit that, while the court of appeals correctly decided the price-fixing issue, it erred in law by upholding the dismissal of the tying and monopolization claims—and we urge those claims as additional grounds for sustaining the court's judgment.

•In that connection, the court of appeals thought it "curious," in the light of what it deemed a "necessity" exception to the price-fixing offense, that, though CBS

> "now focuses its principal attack on the blanket license as a price-fixing device, it was [CBS] which throughout the trial tendered proof upon proof that a direct negotiating market posed *severe* practical problems." Pet. App. 16a.

The "*severe* practical problems" that we proved—music-in-the-can and the lack of adequate direct licensing facilities coupled with the publishers' manifest incentives not to create them—are precisely those which a decree in this case would remove (*see* Point III. B. *infra*). Thus, that proof was neither intended to show, nor did it show, that there was any inherent reason why this market could not function on a direct-licensing basis. The court of appeals, therefore, was simply wrong when it stated

> "If that is true [such "*severe* practical problems"], such proof tends to demonstrate a *need* for the availability of an alternative blanket license." Pet. App. 16a.

On the contrary, such proof demonstrates only the "*need*" for the sort of decree that will remove those artificial bariers and enable the market to function in a natural, competitive fashion (as it now does in the licensing of performance rights to motion picture companies).

Summary of Argument

I. The agreement among otherwise competing music publishing corporations to market their products (music performance rights) to CBS and other television networks through a joint sales agency (ASCAP or BMI) at prices set by that agency constitutes price-fixing, as the court of appeals held, and is illegal *per se*.

That they have agreed that their agency shall sell their entire pool of copyrights at a single annual fee (the blanket license), while distributing proceeds to members at uniform per-use rates (*e.g.*, $1,000 a use), makes this system more restrictive, and certainly no less illegal, than had they agreed to have their agency sell at separate prices for each use (the per-use method of licensing). For the blanket license forecloses licensees from dealing directly with music publishing corporations for separate uses (since no one needs two licenses for the same use), whereas the per-use system would free licensees to engage in direct dealing (since payment to a music publishing corporation for a direct license would obviate the need to pay ASCAP anything for that use).

The ASCAP cartel scheme is not saved by consent decree regulation or rate-making—those procedures neither constitute statutory authority to fix prices nor create competitive conditions. If the consent decree court were actually to set a price tag for the ASCAP package, it would not supplant, it would implement the price-fixing arrangement—by determining how much each user would turn over to the consortium to be funneled back to the members through its distribution system.

And the scheme is likewise not saved by the putative prospect of "individual negotiations," not merely because such an alternative is penalized by this system, but because such a prospect, even were it free from injury, would not remove the fix. Members of a price-fixing

conspiracy always have the right to sell at individually "negotiated prices," in view of the unenforceability of price-fixing agreements; and in many cases holding price-fixing to have been committed, such sellers (unlike the sellers here) have actually exercised such rights. Indeed, since defendants have admitted that they would be fixing prices in *per se* violation of Section 1 if they had their consortia sell at separate per-use rates, (despite the real freedom of music publishing corporations to license directly in such a system), they have certainly conceded that they are presently fixing prices under the blanket system (irrespective of the putative freedom that system affords).

Moreover, since defendants are actually selling at fixed prices, it is unnecessary in law to consider what the impact of that arrangement would be on any putative direct-licensing prices, although (a) such an impact should be presumed on the authority of *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and *Plymouth Dealers' Ass'n.* v. *United States*, 279 F.2d 128 (9th Cir. 1960) (where such a presumption of impact on individually negotiated prices was reached—and done so on less compelling economic grounds than those involved here—in order to condemn as price-fixing joint activity that did not involve agreements concerning the prices to be charged), and (b) the record here also establishes by explicit admissions that any putative direct-licensing prices (charged CBS in the event of a bypass) would be boosted and stabilized over competitive price equilibrium levels by ASCAP's continued presence in the market.

II. Similarly, this scheme is not saved, or entitled to rule-of-reason treatment, by any market-functioning necessity as to other users—defendants have not only conceded, they have actually proved, and two courts have found, that no such necessity exists in the user market which *this* case concerns. Thus, it is fallacious (and in the

context of antitrust enforcement, dangerously so) to conclude, as the Department does, that admittedly unnecessary price-fixing to television networks belongs in the same allegedly protected "species of conduct" as allegedly necessary price-fixing to radio stations, when the purpose of classifying such conduct into "species" is to determine which is necessary and which is not. Indeed, in the prior *NBC* proceeding, the Department branded blanket licensing to television networks, where not necessary for market-functioning purposes, as price-fixing and illegal *per se*.

The so-called benefits of a blanket license, which the Department now asserts make it a "fundamentally different product" from the performance rights themselves, are either

> (a) non-existent as to networks (claimed "efficiencies")—and none would justify price-fixing, even if any were actually achieved;
>
> (b) no more essential to the production of television programs than they are to the production of motion pictures ("flexibility" and "immediate access")—as noted, defendants have so conceded and two courts have so found; or
>
> (c) obtainable separately in a competitive market ("broad indemnification," real efficiencies, and perfectly adequate flexibility and access)—and such a market would function as well as any other market, with the cartel apparatus removed.

In short, the price-fixed products here cannot be transformed into some new "whole" supposedly different from the sum of its parts, since the parts are otherwise competing products, all obtainable separately in a competitive market, as to which competition has been, by this purported "transformation," eradicated.

As to the supposed "benefits" of joint monitoring, the Department's contention has the facts exactly backwards. Not only does the present need for the joint monitoring of network uses fail to justify fixing prices on those uses, but the removal of the price fix would obviate the need for, and eliminate (or at least vastly reduce) the present wasteful expense of, elaborately monitoring network uses.

Finally, the analogy attempted by *amici* Copland, *et al.*, between an industry-wide price-fixing cartel of otherwise competing music publishing corporations and a single integrated economic unit (such as a partnership or corporation) is similarly fallacious. A single law firm no more fixes prices on the underlying elements of its service than the manufacturer of an automobile fixes prices on the raw materials and services it has transformed into a motor vehicle. To make the analogy apposite one would have to assume that all law firms in the country had agreed to have the ABA sell their products at $500 an hour (or a retainer of 10% of each client's annual income for all services the client could possibly use for the year)—for that is functionally identical to what music publishing corporations now do through ASCAP and BMI.

III. Buyer alternatives to a fixed price which threaten injury or loss and thus do not remove the fix in fact, cannot be held to do so in law, even assuming, contrary to existing precedents, that buyer alternatives were even relevant to a determination of illegality.

That such injury is threatened here is apparent on the face of the district court's findings regarding (a) the impracticability of direct licensing in the absence of direct licensing facilities, (b) the present lack of such facilities, (c) the need for publishers, if the requisite facilities were

to be created, to expend their own efforts and funds for that purpose, and (d) the presently self-defeating nature of any such expenditures on the publishers' part. That the district court also found that that barrier could be overcome by CBS with "a long period of advance preparation" does not strip the barrier of legal effect, but rather reinforces its significance.

Such injury also inheres in the conceded and independently obvious fact that a bypassing network would be forced to convey immense, artificial leverage to those music publishing corporations and writers controlling rights to music-in-the-can. The district court's finding that such leverage would not rise to the level of concerted "hold-ups" is immaterial, since threatened disadvantage, not the possibility of boycott, forms the issue applicable to this point.

IV. Assuming, contrary to law, that price-fixing by music publishing corporations, unlike that committed by other cartels, were governed by a rule-of-reason standard, the vices of this system, unleavened by any value cognizable under the antitrust laws, are sufficiently self-evident to warrant an affirmance on that ground.

Defendants' intention to inflate prices above competitive market equilibrium levels has been openly admitted in direct testimony, in affidavits, and in the very counterclaims filed in this case. But the clearest possible manifestation of that intent is provided by defendants' refusal to grant the less restrictive alternative (a per-use system, which would permit direct dealing, and thus some semblance of price competition, immediately to occur) and to insist instead on a continuation of the blanket system (which totally eliminates any such competition).

The court of appeals notation of that fact, its determination that blanket licensing inevitably "dulls" defendants' "incentive to compete" (Pet. App. 20a), its conclusion that the system is unnecessary to the functioning of this market, and its proposal of a less restrictive alternative comprise, on analysis, a holding of unreasonableness. Additional anticompetitive effects that support that holding are the barriers to direct licensing necessarily arising from this sort of cartelization, the price reference impact it would have on any direct-licensing transactions (even under the unrealistic assumption that any network would be willing to incur the penalties of a bypass), its transactional inefficiencies and its misallocation of resources.

On the other side of the scale, this system is not productive of any economic benefit not better or equally well achieved in a competitive market.

V and VIII. If ASCAP or BMI were to have refused a CBS request for a separate license to a single use, and insisted instead on licensing the entire pool for the year, that response would obviously have constituted "conditioning" within the meaning of the tying offense. ASCAP's and BMI's actual rejection (throughout the nine-year history of this case) of CBS's request for a use-by-use license is likewise "conditioning"; and the leverage with which it is imposed consists of the injury threatened in a bypass attempt (plus, as to the BMI pool, the exclusivity of that organization's licensing authority).

That same leverage satisfies the identical element of a claim for misuse under this Court's ruling in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969). That the blanket license entails a fee that does not vary with use cannot be open to serious question.

VI. By virtue of such pooling and tying, the defendant combinations have bifurcated what would otherwise be a single market consisting of individual performance rights into two separate markets, each consisting of a

blanket license to approximately half those rights. For the ASCAP blanket license is not "reasonably interchangeable" with a BMI license, the network user indisputably needs music in both pools; and, in the light of the present barriers to a bypass, neither blanket license is "reasonably interchangeable" with direct licenses to such music.

Defendants plainly have monopoly power in markets defined by their own pools; and since they have achieved it by cartelization to which there is concededly no necessity, they have done so "willfully" in violation of Section 2.

This is not the often advanced fallacy in which a single economic entity is said to have monopolized its own sales—nor is it even dependent on the size of each cartel's pool. If both consortia licensed performance rights separately—on a use-by-use basis—and thereby permitted substantial direct licensing to occur, although they would still be fixing prices, they would no longer be guilty of monopolization, no matter how large those pools were. It is the fact that both cartels refuse to sell anything but a single package, thereby precluding any substitutes for that package, that places each package in a market of its own.

The court of appeals' finding that a direct-licensing market "*can* exist" is indisputably true, but irrelevant to Section 2, except to show that monopolization was not "thrust upon" defendants. For a source of supply to have been monopolized, it is enough that alternative sources, whether or not they "can exist," threaten the buyer with sufficient disadvantage that he is likely to be deterred from resorting to them by the handicap imposed.

VII. We believe it to be equally clear, by necessary implication, from *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962), and *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and by square holding in *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949), and

Alden-Rochelle, Inc. v. *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions) that price-fixing, tying and monopolization of copyrighted music constitute copyright misuse (and, on the price-fixing ground, the court of appeals so held here). Indeed, this Court's initial adoption of the patent misuse rule was predicated on the authority of the copyright misuse concept. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942).

The misuse defense is not inconsistent with the *Kiefer-Stewart*• through *Perma Life*•• line of decisions. Misuse is premised ultimately on the view, inapplicable to the *Kiefer-Stewart* type of case, that the recipient of such a special, publicly conferred benefit as a statutory monopoly, who abuses the public interest through the use of that monopoly, should not be entitled to enforce it during the period of misuse. Thus, while the *Kiefer-Stewart* rule precludes a defense which could thwart the procompetitive objectives of the antitrust laws, the misuse defense serves the same procompetitive purposes by thwarting the anticompetitive extension of a statutory monopoly beyond the limits of its grant.

The distinction defendants claim between the supposed economic importance of copyrights and patents is wholly beside the point, even if such a sweeping generalization were valid (which it is not). The misuse doctrine is no more affected by the fact that some patents are stronger than other copyrights (or *vice-versa*) than it is by the fact that some patents are stronger than other patents. For the misuse concept derives, not from the varying degrees of economic importance inherent among statutory monopolies (patent or copyright) but from the impermissible *extension* of those monopolies inherent in the antitrust offense.

•*Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

••*Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

Finally, the copyright misuse defense can no more be deemed overly "harsh" than can the patent misuse defense, since the holder of a statutory monopoly can always revitalize his rights of enforcement by purging himself of misuse.

IX. The basic feature of a per-use license (sought here, in the alternative, to a straight injunction against price-fixing) is that the user would pay a separate fee for each use, rather than an annual fee irrespective of use. By covering music-in-the-can, permitting a substantial amount of direct licensing immediately to occur and precluding realistically any return to a full blanket system, per-use licensing would effectively break down the present barriers to direct licensing and permit a rapid evolution to a competitive market.

The imposition of such a system, therefore, is not simply the replacement of one form of price-fixing for another (as defendants complain) but, in the unique present circumstances of this market, sensible and efficacious interim relief.

Argument

POINT I

THE COURT OF APPEALS CORRECTLY HELD THAT DEFENDANTS FIX PRICES.

A. The Manner in Which They Do So.

Music publishing corporations are fixing prices. That is a fact; it is not subject to reasonable differences of opinion. To see that with unmistakable clarity one need only follow these steps:

If there were no ASCAP or BMI, and the music publishing corporations conspired to charge $1,000 a use in direct sales, that would represent the garden-variety (or, as the Department calls it, "mine run" (Br. 15)) price-fixing case, and even these defendants would admit the violation. Indeed, such an agreement would be illegal

per se even if the conspirators frequently cut prices in individual negotiations below that $1,000 level.

Likewise, if the publishers appointed a committee to make their sales at $1,000 a use, that, too, would be price-fixing, as this Court held in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 135-36 (1969), "beyond peradventure," and "so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field." *See also, e.g., United States* v. *Line Material Co.*, 333 U.S. 287 (1948); *Virginia Excelsior Mills, Inc.* v. *FTC*, 256 F.2d 538 (4th Cir. 1958).

Thus, if the publishers and their committee happened to notice after a period of years that each television network was paying in the aggregate about $5 million a year (the sum of all those $1,000-a-use payments), and the committee decided to change the system by charging each network an annual price of $5 million for unlimited uses (and to make distributions to its members at $1,000 a use or whatever), no one could rationally disagree that the publishers were still fixing prices through their committee.

In none of those examples would prices be determined, as required, by the "unrestrained interaction of competitive forces" *(Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958))—they would be determined by agreement among otherwise competing sellers—and that, as the court of appeals held, is most assuredly a price-fixing agreement.

There is no difference pertinent to Sherman Act illegality between the last of the three arrangements described above and the present ASCAP/BMI system. In fact, the last example is the essence of that system.* The

*As stated in Note, *CBS* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 YALE L.J. 783, 793-94 (1978),

> "When a group of sellers vend their product through a joint sales agency at a single price, competition among the individual sellers ceases to exist. Market forces do not determine how much each seller is to receive for his product. Instead, the decision is made by the agent. ASCAP does not

fact that it did not undergo the evolutions of the prior two examples, but commenced at the third, does not make it better than the third example; it simply means that the cartel members launched the most restrictive and effective price-fixing scheme at the outset.

For these arrangements are hardly equal in terms of anticompetitive effect. In the first type (the mine-run agreement), "cheating" will almost inevitably occur and may even be rampant, so that prices are likely to deteriorate beneath the level at which they were originally rigged. In the second type, where the committee not only sets the price but makes the sales, the cartelization is nearly complete. There still exists the possibility that individual cartel members might make "a little deal on the side that sabotages [the] basic contract" (as ASCAP's president, Stanley Adams, once lectured a group of writers) (E 455); but the "important" purpose of "presenting a solid front" (another part of Mr. Adams' teaching) (E 454) can be more effectively preserved.

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set the price for the licensing of single compositions as in simpler price-fixing schemes. But by offering a blanket license, it sets one price for all compositions, and price competition among members of ASCAP is eliminated as surely as if the rate for each performance were fixed at the outset. Copyright owners, much as patent owners, may not pool their properties in order to fix prices." (Footnotes omitted.)

ASCAP (Br. 22n.) and *amici* Copland *et al.* (Br. 9-10) criticize the court of appeals' statement that

> "When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition." Pet. App. 11a.

While the court of appeals did not base its holding of price-fixing on that statement, it is nevertheless apparent that, under ASCAP's four-fund distribution method, which virtually all professional song writers elect, a portion of their compensation is based on the longevity of their membership in ASCAP (Pet. App. 11a n.15; E 143-44, 156-59)—a fact unrelated to music usage, but not to the adhesion of the cartel.

And certainly, the third arrangement—a blanket licensing system—is no less effective than the second. Indeed, because of the all-or-nothing provision of the blanket license which precludes direct dealing by any licensee, and because, as will be discussed more fully below (*see* Point III, *infra*), such a system inherently creates barriers sufficiently high to preclude in practice any direct-licensing alternative to that all-or-nothing provision, it actually suppresses even that "little deal on the side" and makes the "solid front" effectively impenetrable insofar as the network is concerned.

In short, what defendants have perpetrated here is no mere mine-run, hotel room conspiracy, but price-fixing consortia more effective than the OPEC cartel.

B. The Irrelevancy of Consent Decree Rate-Making.

The fact that a federal court is empowered by the 1950 ASCAP consent decree to set a "reasonable" price for that consortium's package neither dislodges the price fix nor, as the Department concedes (Br. 17 n.13), is even pertinent to this case*—*amici* Copland, *et al.* (Br. 7), and *K-91 Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1, 4, (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), to the contrary notwithstanding.

At the outset there should be dispelled any notion that the "reasonableness" of a non-competitive price, whether judicially or otherwise determined, has anything whatever to do with the purposes of the antitrust laws or the rules laid down in their interpretation.

The Sherman Act, as the court of appeals observed, says nothing about "reasonable" prices (Pet. App. 11a-12a). It is "aimed at preserving free and unfettered

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*Nor is it even applicable to BMI, whose consent decree contains no rate-making provisions. *United States* v. *BMI*, 1966 Trade Cas. ¶ 71, 941 (S.D.N.Y. 1966).

competition as the rule of trade." *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). What it guarantees are prices determined by "the unrestrained interaction of competitive forces" *(ibid.)*; what it therefore prohibits is any combinative practice "which prevents the determination of those prices by free competition alone." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

Thus, whether otherwise competing sellers agree to sell at a price (a) set by an independent accounting firm authorized to hold hearings for the purpose, (b) established by a federal district court, or (c) pegged to the Dow-Jones Average *(e.g.*, 960 = $960-a-use), that price is still not determined by the dynamics of a competitive market—it is, therefore, noncompetitive and fixed.*

In short, the fundamental error in *amici's* contention and the Ninth Circuit's conclusion that "ASCAP cannot be accused of fixing prices" so long as the consent-decree court is prepared to do so is their failure to recognize the point at which prices are being fixed. ASCAP members fix prices before contact with any user is made and certainly before the matter is brought to the federal court. They do so by agreeing to sell by committee, rather than by competing among themselves.

All the court has the power to determine under the ASCAP decree is the price tag for the committee's package— *i.e.*, how much each user will turn over to the consortium to be funneled back to the members through its distribution system. By so doing, the court by no means supplants—indeed, it implements—the members' price-fixing arrangement:

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*By statutes governing various forms of public utilities, rate making proceedings largely displace Section 1 of the Sherman Act in so far as it bans price-fixing; but there is obviously no statutory exemption for the ASCAP combination, and absolutely no economic justification for granting public utility treatment, as ASCAP's own economic expert witness so copiously admitted on this record (Nathan Tr. 3880-81, 3971-72, 3979-80, 3983).

> "For a price fixed by a judge, no matter what his personal competence, is not a true reflection of competitive market forces. The price, no matter how reasonable, if determined on the imprimatur of a court, remains the product of non-competitive forces." Pet. App. 18a.

For essentially the same reason, it is specious to claim, as does BMI, that its music publishing corporation affiliates are absolved from fixing prices because they have turned over the decision regarding the prices to be charged to the BMI Board on which they are not represented (Br. 20).

Under this reasoning, the various domestic manufacturers of tetracycline, while clearly guilty of price-fixing if the pricing authority were given to the Pharmaceutical Manufacturers Association (on whose Board they are represented), would not be guilty of price-fixing if they were to confer that authority on the Board of the American Iron and Steel Institute. One could envision, if this argument were accepted, a series of cross-price-fixing agreements among the trade associations of all major industries.

BMI's apparent assumption is that price-fixing is limited to a situation in which sellers agree themselves to price at conspiratorially rigged levels. But since the joint sales agency scheme stifles competition more effectively, exonerating the latter under Section 1, while holding the former illegal *per se*, would be senseless—and, of course, is not the law.

BMI also attempts to equate itself to an ordinary wholesaler of goods (and thus differentiate itself from ASCAP, which it calls "a classic joint selling agency") (Br. 18). But BMI does not acquire title or assume any risks as to its publisher affiliates' copyrights (if it had, its violation of Sections 2 and 7 would be patent). The music

publishing corporations simply authorize BMI to act as exclusive sales agent for one aspect of their copyrights (performance rights) in certain performance rights markets (*e.g.*, television networks) and there to fix prices on their behalf.

As to the additional BMI contention that such authorization is given by each publisher in "an individual contract with BMI" (Br. 20), the short answer is that stated by this Court in *United States* v. *Masonite Corp.*, 316 U.S. 265, 275-76 (1942):

> "Nor can the fact that Masonite alone fixed the prices, and that the other appellees never consulted with Masonite concerning them, make the combination any the less illegal. . . ."•

C. The Irrelevancy of the Consent Decree "Right" to Engage in Individual Negotiations.

The fact that music publishing corporations were compelled by the 1950 ASCAP consent decree to accept

•BMI further implies that defendants' practices should not be governed by a *per se* rule because they are "required" by their respective decrees to issue blanket licenses to television networks (Br. 18). If there were such a requirement, the decrees themselves would be unlawful (*United States* v. *Columbia Artists Management, Inc.*, 1963 Trade Cas. ¶ 70,955 (S.D.N.Y. 1963), *aff'd per curiam*, 381 U.S. 348 (1965)). Moreover, there is no more reason why a private claimant should be precluded from asserting a *per se* rule because of a consent decree to which he was not a party than there is any reason why a private claimant should be precluded by such a decree from bringing suit. *See* Pet. App. 18a-19a; *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); *United States* v. *ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964). But the fact is that neither decree requires the music publishing corporations to continue to authorize ASCAP or BMI to license their music, let alone compels them to fix prices to television networks (*see* Addendum C, regarding the incident in *United States* v. *ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, *supra*, where a group of music publishing corporations threatened to discontinue their authorization of ASCAP to license their music to television stations in order to frustrate the sort of ASCAP license sought by the stations that would have permitted some direct licensing to occur).

the "right" to sell directly to their customers (*i.e.*, not through the ASCAP consortium) and the "right" to charge other than consortium prices similarly fails to remove the price fix (even apart from the historical fact that they have never exercised any such "right").• All members of all price-fixing conspiracies *always* have such "freedom" in view of the unenforceability of price-fixing agreements —and the case books are filled with successful price-fixing prosecutions, including criminal convictions, in which the conspirators (unlike those here) actually and frequently exercised that "freedom". *E.g.*, *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 488-89 (1950); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-23 (1940); *Plymouth Dealers' Ass'n* v. *United States*, 279 F.2d 128, 132 (9th Cir. 1960); *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914, 930-31 (S.D.N.Y. 1965).

Plainly, such "freedom" does not somehow "unfix" the prices of Committee sales or otherwise make them competitive. As to those sales, price competition has not merely been restrained, it has been eliminated; and that is true whatever additional number of direct sales the participants in this combination might also transact.

And surely, an agreement by otherwise competing sellers regarding the prices they will charge need not, to be unlawful *per se*, extend to all prices that might be offered in all other putative forms of transactions. Indeed, such agreements are illegal *per se* even if the conspirators never charge the agreed-upon price. As this Court stated in *Socony-Vacuum*,

> "It is the 'contract, combination * * * or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or

•Nor, again, is such a "right" applicable to BMI, whose authority to license is exclusive (*see* note at 31, *supra*).

> successful on the other . . . . Price-fixing agreements may or may not be aimed at complete elimination of price competition. . . . They are all banned because of their actual or potential threat to the central nervous system of the economy . . . ." 310 U.S. at 224-26 n. 59.

Those principles apply *a fortiori* to price-fixing cases featuring frequent departures from agreed-upon prices (such as those cited immediately above), to those involving agreed-upon price ceilings (*see Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), and *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968)), and certainly to this suit. It has been argued in price-ceiling cases, as an analog of the contention advanced here, that a rule-of-reason analysis should be undertaken to determine whether the ceiling has been set sufficiently high as to permit the sellers "freedom" to arrive at "independently negotiated" prices (*see Albrecht* v. *Herald Co.*, 390 U.S. at 156, 168). No such analysis is in fact indulged in; it is rendered superfluous by the *per se* rule; and there is every reason why it should be.

Price is simply too sensitive and critical a mechanism in the proper functioning of competitive markets, and the achievement of basic economic goals, such as the efficient allocation of resources, which competition is supposed to foster, to permit it to be tampered with by sellers' agreements, particularly those entered into, as here, by every firm in the industry. As this Court stated in dealing with another horizontal *per se* offense,

> "Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision-making." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611 (1972).

The very fact of such agreements is dispositive of the liability question in this case. Hence, the court of appeals correctly held:

> "[E]ven if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S. Ct. 811, 843, 84 L. Ed. 1129 (1940)." Pet. App. 12a.*

What indeed makes remarkable defendants' continuing contention that the "retained right" they share with other price-fixing conspirators validates their fixing of price has been their further contention that the per-use system (now tentatively approved by the court of appeals) would represent a "classic" case of price-fixing,** even though the "retained right" is far more realistically a part of that system than it is of the blanket. And at least equally surprising is the Department's position on this

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*ASCAP allegedly finds comfort in this Court's restatement of the principle in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), that only "plainly anticompetitive" acts are illegal *per se*. Since the price-fixing committed by ASCAP and its members represents the most "plainly anticompetitive" act on the ledger of antitrust offenses, the restatement of principles most pertinent to the present case is contained in the following passage of that opinion:

> "The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. [Citations omitted.] That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason." *Id.* at 689-90 (footnote omitted).

**As BMI put in its post-trial brief (at 120) and similarly argued in its brief to the court of appeals (at 10); or as ASCAP asserted below,

> "[W]e contend, in fact, that a per-use license would itself be a price-fixing scheme and a violation of the antitrust laws." (ASCAP's Memorandum Re Proposed Order on Rule 42(b) Motion, dated May 5, 1972 at 6).

appeal, in the light of its concession (albeit, in euphemistic terms) that ASCAP's licensing of separate compositions (*i.e.*, a per-use method, with full "retained rights") "*might*" enable ASCAP "to fix a price for such a license and eliminate competition among its members" (Br. 4 n.5 (emphasis added)).

In all respects material to the price-fixing issue, the per-use method of licensing is identical to the blanket arrangement, except in one cardinal respect which makes it far less restrictive—and that concerns the method of payment. Under the blanket license, the network user pays a flat fee or percentage of income for the entire term of license (a year or longer), so that to engage in direct licensing would mean paying twice for the same music. Under the per-use system, uses would be separately priced, so that to engage in direct licensing would mean paying nothing to ASCAP at all (the only payment would be that negotiated with the publisher in a direct licensing transaction). The fact that ASCAP would continue to sell music at $X a use as an alternative to direct licensing, would certainly represent, as defendants say, a "classic" case of price-fixing.

But how, then, could that same "retained right" remove from the price-fixing category an all-or-nothing blanket license to the entire pool which effectively eliminates that very "retained right" for any user taking that package?

Of course it does not.

In short, no one questions the fact that ASCAP was fixing prices when its rights, prior to the 1941 decree, were explicitly "exclusive" or, prior to the 1950 decree, were effectively so. *Watson* v. *Buck*, 313 U.S. 387, 398, 404-05 (1941); *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 893-95 (S.D.N.Y. 1948); *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843, 849 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F. 2d 515 (8th Cir. 1949). *See also*

Affiliated Music Enterprises, Inc., v. *SESAC, Inc.*, 160 F. Supp. 865, 875 (S.D.N.Y. 1958), *aff'd on other grounds*, 268 F.2d 13 (2d Cir.), *cert. denied*, 361 U.S. 831 (1959). But neither the 1941 decree nor the 1950 decree has stopped, or even purported to stop, ASCAP from fixing prices. They have merely rendered ASCAP's "right" to do so "non-exclusive." And the legality of price-fixing under the antitrust laws has never before depended on the "exclusivity" or "non-exclusivity" with which prices have been fixed.*

D. The Invalidity of ASCAP's Single "Undertaking" Contention.

Given their admission that per-use licensing would be "classic" price-fixing despite "retained rights," defendants should not even be heard on their assertion that blanket licensing is not price-fixing *because* of "retained rights." And, given the irrelevancy of any such "rights" in a routine price-fixing or price-ceiling case, it should be unnecessary in law, in any event, to go further.

Nevertheless, to demonstrate categorically that a joint-sales-agency scheme of otherwise competing music publishing corporations (with "retained rights") is as worthy of the application of the *per se* rule as any mine-run conspiracy, it is useful to meet, head on, this additional contention—*viz.*, that mine-run conspirators undertake

*Although unrelated to the merits of the price-fixing claim, defendants and *amici* cite "exposure" to treble damage recoveries as at least an emotional ground for overturning the court of appeals' decision. As is apparent, CBS has never sought damages in this case—its requested relief is purely injunctive. If this Court were to be persuaded that defendants were liable to other plaintiffs, but that treble or even single damage recoveries were not justified, the Court has inherent power so to rule. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-07 (1971); *Simpson* v. *Union Oil Co.*, 396 U.S. 13, 14 (1969). Obviously, if the Court thought treble damages were justified, it would rule that way instead. But whatever the subsequent ruling in any subsequent case, the damage issue is neither presented by this appeal, nor will any decision on this appeal necessarily resolve any such issue.

two commitments, (1) to sell at a given price (for example, $1,000 a unit), and (2) *not* otherwise to sell, whereas music publishing corporations do not undertake the second (ASCAP Br. 26).

It will be immediately recognized that price-fixing decisions of the past have not analyzed price agreements in terms of two undertakings; it has been enough that competing sellers had agreed on prices to be charged. It is also clear that decisions dealing with mundane methods of fixing price had no need to assay precisely how such agreements affected actual sales prices, even where the conspirators seldom adhered fully to the agreements. But the complete answer to ASCAP's insistence on the materiality of a second "undertaking" is revealed on exactly such an analysis. For the two main price influences that are conclusively presumed in routine price-fixing cases—and normally done so *sub silentio* precisely because such agreements are unlawful *per se*—are as economically axiomatic here as in those cases; should thus be presumed as conclusively here as in such other cases; but, for good measure in this litigation, have been admitted point-blank by both groups of defendants.

1. The Impact of an All-Industry Committee Reference Point Price on Competitive Price Equilibrium Levels.

(a) The Impact in Fact.

ASCAP distributes approximately $1,000 ($500 to the publisher or publishers; $500 to the writer or writers) for each television network feature performance of an ASCAP composition (and correspondingly lower amounts for theme and background uses) (Pet. App. 11a n.15). From the standpoint of the copyright proprietors, their common-sales committee, ASCAP, is effectively selling feature performance rights to television networks for

$1,000 per use. So long as ASCAP continues to do so (at $1,000, $1,200, $800 or whatever that figure is) that fixed price and all the sales made at it would necessarily warp toward it, boost and stabilize prices in direct-licensing transactions. Any publisher from whom CBS or a producer were to solicit a direct-licensing price quotation would necessarily take into account the price at which he is selling to other networks through ASCAP and had been selling to CBS. It becomes a reference point or point of departure—*i.e.*, a determinant of price that does not arise from competitive conditions, but is injected artificially into the market by an industry-wide sellers' agreement.*

The degree to which prices would be stabilized could not be quantified even if direct licensing actually occurred; it is not susceptible of ascertainment. But it does not have to be quantified; the very problem of establishing such an impact empirically is one of the major reasons why arrangements of this nature are illegal *per se*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-26 & n. 59 (1940). As stated by the court of appeals in *Plymouth Dealers' Ass'n* v. *United States*, 279 F. 2d 128, 133 (9th Cir. 1960):

> "The very fact that this is extremely difficult of proof is probably one of the reasons why, in its wisdom, the Congress has seen fit to establish the law, and the Supreme Court to establish certain *per se* consequences of the proscribed action."

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*As observed in the Yale Note (*see* note at 51, *supra*), 87 YALE L.J. 783, 793 n.64,

> "It is difficult to conceive of circumstances under which the existence of an agreement to fix prices would not affect the price at which direct dealings would occur. In view of ASCAP's and BMI's domination of the market, the final price in any direct negotiation could hardly be the product of price competition, but would be influenced by the price fixed by ASCAP. *Cf.* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE at 164-73 (1970) (describing types of price leadership)."

The fact is, however, that the record in this case is sufficiently copious even to demonstrate, if not the magnitude of the effect, at least the inevitability of its occurrence. For example, when Mr. Chiantia (President of MCA Music; Vice President and Board member of ASCAP; President of the NMPA and Board member of the NMPA and the Harry Fox Agency, Inc.) was asked about the price at which he would be willing to deal directly with CBS, his immediately expressed point of departure was the current ASCAP distribution level of approximately $1,000 per-use, and he reasoned from there to a price of $3,000 (Tr. 2943-44). At the other extreme, but illustrating precisely the same proposition, was the testimony of Mr. Vogel (President of Jerry Vogel Music Co., Inc., proprietor of one of the foremost catalogs in the music publishing business, PX 883):

> "Q. Assuming that you had made the decision to deal with CBS for whatever reasons, would you quote different prices for different uses?
>
> "A. No, same price, same as ASCAP." (D 934-35)

Robert Nathan, ASCAP's own economic consultant on its distribution system and its economic expert witness at trial, admitted unequivocally on examination by the court that the ASCAP price would be a "referent point" or "point of departure" in any direct-licensing transaction (Tr. 4182-83).* As he later expanded on the point:

*The questioning of Mr. Nathan at that point in the transcript referred to the per-use price which ASCAP would charge under a per-use system (proposed by CBS as alternative relief); and he readily gave the answer noted above. In terms of a reference-point stabilization effect, of course, there is no material difference between such a per-use rate and ASCAP's present per-use distribution amounts to its members.

Based on his admission, therefore, regarding the price-stabilization effect of per-use rates, Mr. Nathan necessarily applied the same principle to ASCAP's present per-use distribution rates, as is indicated by the next passage of his testimony quoted in the text below.

> "Q. Let's assume at this time the ASCAP distribution rate for feature music is $800 and lower fees for other categories.
>
> "Do you think those fees would have any influence on prices arrived at, prices offered by publishers?
>
> "A. Oh, I think it would be one factor. If I were a publisher and you represented producers of Columbia Television and you came to me, I think I would start putting numbers down and say, how much have I gotten in the past, try to figure out that average and think of something and then I think I would certainly use that as one of my factors in considering the bargaining price; one factor." (Tr. 4200-01)

"It would", he further agreed, "hover over the atmosphere" (Tr. 4183). It is such hovering that "interfer[es] with the free play of market forces," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940); and it is the inevitability of such interference that leaves no doubt that ASCAP's price-fixing system is unlawful *per se*.

The same "hovering" was admitted by the BMI defendants at an earlier stage in this lawsuit. For on their motion for a preliminary injunction, they affirmed:

> "CBS cannot hope to persuade any BMI affiliate to license directly unless it proposes to pay more than BMI would . . . ." (JA 106)*.

BMI again conceded the point in its very petition to this Court, where it stated,

*As was true of Mr. Nathan's initial admission on the subject (Tr. 4182-83), BMI's admission related to the stabilization effect of BMI prices in a per-use system. As Mr. Nathan then conceded, and as is independently obvious, exactly the same is true of the per-use distribution rates each licensing organization applies under the present system. *(footnote continued on next page)*

"To be sure, the price of a BMI license—like any other price in a market—has an effect on what would be charged in direct licensing transactions. . . ." (BMI Pet. 15)

The difference, of course, between a BMI price (which is rigged by cartel) and "any other price in the market" (which is negotiated by an individual seller) is dispositive insofar as Section 1 is concerned.*

Hence, ASCAP's own admission of the price-stabilization effect of per-use prices is equally an admission of how the present per-use distribution rates to its own members would stabilize prices in the event direct licensing were to occur in a bypass attempt:

"The fact is, however, that the per-use rates to be set by the court would inevitably become the focal point around which any direct licensing transactions would take place. . . ." (ASCAP's "Comments on CBS' Latest Statement of the Elements of a Per-Use License," dated May 24, 1973, at 2.)

*Although the court of appeals stated that it was "not convinced" that the price stabilization effect "is necessarily so" (Pet. App. 22a), it did not refer to defendants' outright admissions of this point discussed above, nor to the bases in law for presuming such effect (discussed immediately below). It further stated that "the District Court found the contrary"—but there is no such finding (and any to that effect would have been clearly erroneous).

Moreover, the sole reason cited by the court for its dubiety on this point—"the counterforce of the strong bargaining power of CBS"—does not logically or economically support it, even apart from the fact that independent packagers (and rarely CBS) will be doing the bargaining (*see* pp. 28-31, *supra*). Whatever CBS's "bargaining power" might be in a competitive market as a "counterforce" to the "bargaining power" of the music publishing corporation, prices will be substantial (*e.g.*, performance rights are now licensed to motion picture companies for films at prices ranging from $750 to $20,000, Mingle Tr. 869-70). (Indeed, the music publishing corporation must also take into account the opportunity cost stemming from the fact that the use of a composition on a CBS television network program will preclude or deter its use in the same season on an NBC or ABC program (Wright Tr. 411-15; Vincent Tr. 591-92; Sunga Tr. 742-43; Fisher Tr. 1670-72).) And whatever those prices would be in a competitive market, they would inevitably be boosted and stabilized if ASCAP were to continue to sell at $1,000 a use—in an even more direct way than OPEC's price of $1,000 a barrel boosts and stabilizes the prices of domestic refiners (for here ASCAP is selling the same supplier's music at the cartel rate).

(b) The Presumption of Impact in Law.

As noted, it is difficult to find an express judicial application of the presumption of a price-stabilization effect in a mine run price-fixing action (although such an impact is normally evident) because the application of the *per se* rule (which obviates the need for assessing effects) is too obvious to require such discussion. Thus, reference must be made to such cases as *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), and *Plymouth Dealers' Ass'n.* v. *United States*, 279 F. 2d 128 (9th Cir. 1960), where the courts did consider what the effect of the joint activity there involved was likely to have been on price—but did so *only because* such activity was *not* an agreement on the prices to be charged, and could be held within the price-fixing offense only if such effect on price could be presumed.

The district court in the present case deemed the *Socony-Vacuum* decision "inapposite" on the stated ground that it involved facts, supposedly "unlike" the present, in which "sellers agreed among themselves as to the prices to be charged buyers for their products" (Pet. App. 40a).

Were those actually the facts in *Socony-Vacuum*, the decision would be of routine interest here, although hardly "inapposite." For such an agreement obviously exists in this case despite the "retained right" it has in common with other price-fixing litigation. But what makes the *Socony-Vacuum* decision so particularly compelling here—where the district court excused defendants' price-fixing in common-sales-agency sales on the indefensible ground that they had not agreed on the prices at

In other words, the question is not, as the court of appeals appeared to believe, how low CBS could drive average prices, for CBS is entitled by the antitrust laws to exert "whatever economic muscle it could muster" (*United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)), but whether natural (competitive market) price levels would be influenced by continued cartelization; and the answer to that question is apparent.

which they might otherwise sell—is that the defendants in *Socony-Vacuum* (twelve major oil companies and five individuals) were criminally convicted of fixing the retail prices of gasoline, even though they most certainly never went so far as to agree on those prices.

The period covered by the indictment was 1935-36. Prior to and during that time, retail prices of gasoline had been descending to low levels, largely because of the over-production of independent refiners in the Mid-West and in East Texas. Beginning during the period of the NRA industry codes, but pursued after NRA had been held unconstitutional, those oil company defendants jointly carried out a program to buy some of the independent refiners' surplus ("distress") oil in order to decrease the supply of that product on the spot market.

The defendants in *Socony-Vacuum* did not agree even on the prices at which they would *buy* distress oil, much less at the prices at which they would sell gasoline. Also, the prices at which the defendants sold were substantially disparate during the period and price-cutting was prevalent (310 U.S. at 200, 220).

But it is basic economic doctrine that price is a function of supply and demand, so that a joint-buying program to achieve a reduction of supply will tend to increase price (if demand is constant or rising) or stabilize price (if demand is falling). Thus despite the lack of agreement as to the price at which the defendants bought *or* sold, the agreement to undertake the buying program was branded "one species of price fixing" (*id.* at 223) because

> "[I]n terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on)

> market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. . . ." *Ibid.*

And that stabilization effect—that "artificial stimulus"—was held illegal *per se:*

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. . . ." *Id.* at 221.

If the oil company defendants in *Socony-Vacuum* could be held guilty of "one species of price fixing" without agreeing on price at all—and while actually exercising their retained right to sell at individually negotiated prices—because of the presumed price-stabilization effect of the buying program, then ASCAP members must also be guilty of "one species of price fixing," not only because they are actually selling at agreed upon prices within the combination, but also because of the more direct, and actually conceded, price-stabilization effect that such fixed prices would have on any putative exercise of their historically unutilized "retained right."

It should also be noted, with respect to the *Socony-Vacuum* decision, that the Court's ruling that an agreement among otherwise competing sellers was illegal *per se* would ordinarily have made it unnecessary for the Court to make specific findings regarding the actual *effect* of the agreement on prices. Because of the wording of the indictment

in that case, however, it was in fact necessary for the Court to find support for a jury determination of the actual impact of the program on prices:

> "Under this indictment proof that prices in the Mid-Western area were raised as a result of the activities of the combination was essential . . ." *Id.* at 224-26 n. 59.*

But the Court made it abundantly clear (in what is probably the most often cited passage of the opinion) that the price-fixing offense does not otherwise depend on such a finding of actual impact— *i.e.*, it applies "whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other" *(ibid.)*.

What the decision therefore nets down to—and the point for which it is recognized as one of the leading decisions in antitrust jurisprudence—is that any agreed-upon joint activity among sellers that specifically applies to the market dynamics by which price is determined, and ***which under normative economic principles may thus be presumed to affect price***, is unlawful *per se*. In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 445 (2d Cir. 1945), Judge Learned Hand recognized precisely that rule of law to be the teaching of the *Socony-Vacuum* decision:

> "It will be remembered that, when the defendants in that case protested that the prosecution had not proved that the 'distress' gasoline had affected prices, the court answered that that was not

*The Court based its conclusion, as one might expect, on inference:

> "the fact that sales on the spot markets were still governed by some competition is of no consequence. For it is *indisputable* that competition was restricted through the removal by respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets. . . ." *Id.* at 220 (Emphasis added).

> necessary, because an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect upon prices, and was as unlawful as an agreement expressly to fix prices. *The underlying doctrine was that all factors which contribute to determine prices, must be kept free to operate unhampered by agreements.*" (Emphasis added.)

Another "species of price-fixing" based on an inferred stabilization effect was that for which the defendant was criminally convicted in *Plymouth Dealers' Assn.* v. *United States*, 279 F.2d 128 (9th Cir. 1960)—despite its members' "retained right," their lack of any agreement whatever regarding actual selling prices, and their engagement in price competition.

The defendant in that case was a trade association of Plymouth dealers in the San Francisco Bay Area. What it did was to print a set of retail "list" prices somewhat higher than factory "list" prices and circulate it to its members as well as other Plymouth dealers in Northern California. Its stated purpose for so doing was "to eliminate public distrust, occasioned by the previous wide variance in quoted ['list'] retail prices" among Plymouth dealers (*id.* at 133), particularly since the Ford and Chevrolet dealers had uniform "list" prices.

There was no claim in that case that the Association and its members expected such "list" prices to be actual selling prices. Indeed, the court of appeals found that

> "It was not intended to be so used. It was fixed 'high' so a greater trade-in could be allowed. . . ." *Ibid.*

There was also no question but that the Association members engaged in individual negotiations and price competition. "The fact," said the court, that "they cut

prices in bidding against each other, is irrelevant" (*id.* at 132).

However, it was inevitable that the list circulated by the Association would be used as a reference point in negotiations (and several dealers admitted that it was). That fact, plus testimony "from which it [could] be inferred that some sales actually were made at the list price" (*id.* at 133) were quite sufficient to enable the court to presume a price-stabilization effect and uphold the conviction on the authority of *Socony-Vacuum:*

> "This was a 'factor which prevents the determination of [market] prices by free competition alone.' . . ." *Id.* at 134.

Certainly the court did not purport to make any finding of actual price-stabilization; it eschewed the need for any such proof. As the court stated, "the test is not what the actual effect is on prices" (*id.* at 132). And, as the court later observed,

> "In a deteriorating market . . . no matter what steps are taken to influence prices, sometimes the power of larger economic factors prevail. . . . The very fact that this is extremely difficult of proof is probably one of the reasons why, in its wisdom, the Congress has seen fit to establish the law, and the Supreme Court to establish certain *per se* consequences of the proscribed action." *Id.* at 133.

In net effect, then, the Ninth Circuit held that the mere circulation of the "list," without any agreement on the prices of direct-dealing sales, was unlawful *per se* because of the probability that the "list" would tend to stabilize those prices. How much more obvious would that effect have been, and how plainly unlawful, had all automobile dealers in the country (as is true of all music publishing corporations) formed an industry-wide sales

committee actually to make sales on behalf of its members at that list price.

The fact is that one cannot thrust down in the middle of what would otherwise be a competitive market an elaborate nationwide sales consortium scheme participated in by all sellers and expect that market to remain competitive—*i.e.*, expect prices still to be determined by the "unrestrained interaction of competitive forces", *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958), as required by the antitrust statutes. As a matter of economic reality, precisely the opposite must be presumed.

None of the defendants' or *amici*'s briefs even mentions *Plymouth Dealers*' and, while the ASCAP defendants regard *Socony-Vacuum* as "a classic instance of price fixing and price tampering" (Br. 25), they profess not to understand its application to this suit. The point is that both cases apply here *a fortiori* in three respects:

(i) In each of those cases, the Courts found to be "one species of price-fixing" an activity agreed upon by competing sellers that was certainly *not* an agreement regarding the prices at which any of them would actually sell, *or* one that disturbed their right or their universal practice to engage in individual negotiations. Here, otherwise competing sellers have agreed on the prices at which they would actually sell through the common-sales-agency device; the only "freedom" they purportedly retain is also to make sales directly (although, in reality, there have never been any direct sales).

(ii) In those cases, the Courts presumed that agreements not specifying the prices to be charged would necessarily affect prices to be charged. Here, the agreement is precisely an agreement regarding prices to be charged, so that the presumption of effect on any putative direct-sales prices must be even stronger.

(iii) In those cases, a presumption was useful because the evidence did not categorically establish a price-stabilization effect (it almost never will, unless conceded, because such an effect is almost impossible to quantify). Here, such an effect was admitted at trial and admitted again in the very briefs filed in the case.

ASCAP further claims that the music publishing corporations, unlike the oil companies in *Socony-Vacuum*, lack the "purpose" to fix prices because they organized ASCAP "as a 'clearing house' for copyright owners and users" (Br. 26). In point of fact, the Harry Fox Agency is a clearing house, for it does not fix the prices at which movie performance rights are sold. ASCAP is a cartel, since it engages in precisely that price-fixing activity. If there were a market-functioning necessity for ASCAP to fix prices to television networks, it might then be heard to argue that its "purpose" was benign. But once the mask of such "necessity" has been stripped away, as it has been here, the only evident purpose for fixing price is to do exactly that. Indeed, as is discussed more fully in Point IV.A. below, defendants have explicitly conceded that the purpose of blanket licensing is to foreclose competition and inflate price; and their refusal to offer the less restrictive per-use terms, which would be a lot closer to an actual "clearinghouse" function and yet permit direct licensing to occur, further manifests that intention.

2. The Impact of Publisher and Writer Resistance to Direct Dealing on Competitive Price Equilibrium Levels.

Stabilization by reference point, however, is only one of the effects that the continuation of the present ASCAP system would have on any putative direct-licensing prices or would have in common with mine run price conspiracies.

Though, again, rarely explicated by the courts, the point is self-evident that a businessman will not enter into

an agreement to fix prices unless he recognizes that the elimination of competition is of greater value to himself than its continuation. And he must also recognize that, if he and other sellers were to abandon the arrangement, for the sake of short-run gains, that value would be lost. As the point was articulated here by Leon Brettler (Executive Vice President of defendant Shapiro, Bernstein & Co., Inc.; ASCAP officer; and Board member of ASCAP, NMPA and The Harry Fox Agency, Inc.):

> "In unity there is strength and in disunity there is weakness. The unity of ASCAP which is basically a legal monopoly, we have more strength in combining this negotiation, throwing all our copyrights together into a vast pool of music that makes it very attractive to a user to deal with ASCAP. We don't have to face the problem of all of us individually dealing with a user or a producer. . . ." (D 201)

> "We described the benefits of joining ASCAP. If every ASCAP member licensed every use directly and ASCAP dissolved because everybody was flying off in a million different directions and ASCAP had nothing to license, you bet I would be sorry about it, and so would every member in view of my testimony." (D 235)

Or, as stated by ASCAP 's president, Stanley Adams, from the writers' perspective,

> "[W]hen someone thinks he is getting an addition by making a little deal on the side that sabotages our basic contract, he is really sabotaging himself—he is making a little hole in the fabric of the umbrella. Every hole causes a leak, enough leaks and the rain pours in and I have never met

any person who can walk in the rain without getting wet." (E 455*)

Thus, each seller-participant to the arrangement, in weighing the prospective gains of that "little deal on the side," must take into account and recognize the need to be compensated for the potential loss of the cartel value. It sits on the bargaining table as realistically as a stack of chips. And it therefore "tends," as this Court noted in *United States* v. *Masonite Corp.*, 316 U.S. 265, 281 (1942), "to place a premium on the abandonment of competition"—a premium that buyers have to pay.

Indeed, given such disincentive to compete where there exists only loose arrangements or understandings among sellers, tacit or express, consider the effect where the agreement consists of a highly structured consortium scheme that has accustomed music publishing corporations to a long-standing vacation from the rigors of a competitive market, the shared power of a combination, and thus (as is shown below) a mutually acknowledged resistance to change.

In fact, to inject some realism into this so-called "retained right" on which ASCAP keeps insisting, it should be noted that it is not one that music publishing corporations exactly clamored for or even wished to

*Although Mr. Adams' specific reference was to the "basic" AGAC contract (which AGAC writer members sign with music publishing corporations), he left no doubt in that address that the writers' most important organization, ASCAP itself, had the same purpose of "presenting a solid front" and the same vulnerability to leaks "in the fabric of the umbrella":

> "[L]eft to our own devices we have attempted to get together to protect and foster the inherent rights that we all possess. These devices have taken the form of organizations—all bearing different labels to define a particular segment of creative endeavor. But, whatever the label, they all have a single purpose.
>
> "To resist the splitting of our ranks so that we can be picked off one by one." (E 449-50)

accept. Their explicit agreement prior to 1950 was that all their sales would be made exclusively by the cartel. The single alteration has occurred on a piece of paper: the word "exclusive" has been removed from the contract memorializing the fix (and even that was done as guardedly as it was involuntarily, as a reading of the membership agreement will disclose) (E 20).* The ASCAP world of exclusive licensing has in fact remained unchanged.

No doubt, there is a price at which such a change could be forced and such resistance overcome—*i.e.*, at which publishers can be bought out of their cartel. But the very fact that there exists in this market another artificial, cartel-created factor which *must* be overcome at a price is what would throw competitive price levels into further disequilibrium and thus reconfirm the *per se* illegality of the system, regardless of the so-called "retained right."

Hence, the court of appeals correctly held:

> "[T]he very availability of the blanket license itself involves the fixing of a collective price, which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete." Pet. App. 20a.

It "provides", the court further stated, "a disinclination to compete" (Pet. App. 22a). And that conclusion derives *a fortiori* support. as we will now show, from the same phenomenon conclusively presumed in *Masonite* and from the abundant admissions on this record to precisely that effect.

*To inject further realism into these facts, one would also consider the barriers to direct dealing which this system also creates (*see* pp. 122-36, *infra* and pp. 31-35, *supra*). The point being made here, however, is that the agreement to sell by committee at $1,000 a use is illegal *per se*, irrespective of the *possibility* (however real or unreal) that other modes of sale, or prices, might be adopted.

(a) The Presumption of Impact in Law.

In *Masonite*, the "right" of the colluding sellers to withdraw was recorded, as it is here, on the face of the price-fixing agreement,* and the district court expressly found that the defendants

> "were willing and intended to terminate their respective agency agreements whenever it should become commercially possible to offer a competitive non-infringing product." 316 U.S. at 281.

The reason cited by this Court in explanation of why such a "right" and "intention" were irrelevant, and why the *per se* rule was invoked, apply with compelling force on this appeal:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition. The extent to which that inducement in a given case will have or has had the desired effect is difficult, if not impossible, of measurement. The forces which that influence puts to work are subtle and incalculable. Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented

*Since the agreement to fix prices was unenforceable, each competitor in reality had the right to withdraw at any time, although the termination provisions themselves required six months' notice. 316 U.S. at 272-73. In view of this Court's analysis of the case, a clause providing for immediate termination would have been no more material than the six-month termination provision; but it might be noted that the equally irrelevant "freedom" of the ASCAP publishers to withdraw could not be immediately effectuated either. For the district court here found that the creation of a direct licensing market, given the publishers' present lack of any direct-licensing facilities, would require "a long period of advance preparation" (Pet. App. 65a).

> product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. . . . Control over prices thus becomes an actual or potential brake on competition. This kind of marketing device thus, actually or potentially, throttles or suppresses competing and non-infringing products and tends to place a premium on the abandonment of competition. It is outside our competence to inquire whether the result was or was not beneficent, or whether the evil was or was not realized. As in case of an appraisal of the reasonableness of prices which are fixed, such a determination could satisfactorily be made 'only after a complete survey of our economic organization and a choice between rival philosophies' (*United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at p. 398) and only after weighing a host of intangibles. *United States* v. *Socony-Vacuum Oil Co.*, *supra*. The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*. . . ." *Id.* at 281-82.

(b) The Impact in Fact.

Once again, however, the record of this case evidences precisely that resistance—indeed does so with the most blatant testimonial and documentary admissions of intense antagonism to a competitive system, and the prospective impact of that antagonism on price, that have probably ever been compiled. Yet, as discussed below, the district court did not view that evidence in relation to the premium point to which it applies.

Such evidence is so voluminous that to review only its highlights warranted, in our view, separate addenda to this brief.

Thus, Addendum A summarizes the testimony of publishers and writers regarding their unbridled aversion to the possibility of directly licensing television networks.

Addendum B covers the 3M incident—a case study of crude and strident opposition to dealing outside the ASCAP cartel. It reviews, for example, the internal deliberations of the nine major ASCAP publishing corporations (which presently supply approximately 40% of CBS's ASCAP music requirements, as measured by ASCAP "credits" (E 660; AX 160)) which either flatly refused to deal with 3M on an experimental background music project or dragged the negotiations out so long as to moot the question; the pressures brought to bear on the only two significant publishers which accepted the enormous premiums 3M was offering; the efforts of writers actually to organize a boycott; the urging by ASCAP's General Counsel, Mr. Finkelstein, that the writers' organization, AGAC, actually sue the two ASCAP Board members who did deal—indeed, an incredible brouhaha over what amounted to the direct licensing of merely 700 songs, *after* the ASCAP and 3M negotiations had irretrievably come apart over structural problems, and in an area so minor in comparison to the direct licensing of a television network that at least two of the publishers who dealt with 3M flatly admitted that the greater threat to the ASCAP system posed by a network bypass attempt would either preclude or substantially restrain their willingness to participate in the latter.

If there were any disposition to inquire beneath the facial illegality of the present system, we would particularly urge the Court to review this addendum. Although the district court's discussion of the incident closely parallels the description in defendants' post-trial briefs, it bears about as much relationship to the actual facts as a plot synopsis of "Fanny Hill" might bear to the unexpurgated version.*

Addendum C concerns the *Shenandoah*** incident which should be referred to, not only for the concerted refusal of ASCAP publishers to permit television stations a form of ASCAP license designed to permit some degree of direct dealing, but also for the trial testimony of ASCAP's General Counsel on the subject, the proven disingenuousness of which served to re-emphasize the incident's importance.

As to the independently inferable impact of this sort of ingrained resistance to price competition on competitive

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*The court of appeals' finding regarding "disinclination to compete" (Pet. App. 22a) was not based on this incident or similar facts, but on the inevitable implications of a blanket licensing system (Pet. App. 20a). Thus, the court of appeals reviewed the district court's findings on the incident, not to determine disinclination effect on price, but to see whether they properly evaluated a "thesis," attributed to CBS, "that a direct negotiation market will not work" (Pet. App. 10a). In concluding that it was "not clearly erroneous" for the district court to have found that CBS's "allegations" were "overstated," the court appeared to be referring to "allegations" in support of such a "thesis."

But no such thesis was, in fact, advanced by CBS. It was this misperception by the court of appeals (discussed more fully at 41n. *supra*), and the related failure to distinguish between artificial and inherent barriers, that led the court into error on the tying and monopolization claims (discussed in Points V and VI, below).

In all events, our principal points regarding the 3M incident do not depend upon a showing that the district court's findings were clearly erroneous in fact, but on the proposition that the trial court applied an erroneous legal standard. It is nevertheless true (as is shown in Addendum B) that the major premises of the findings consist of very obvious arithmetical errors about which there cannot be any reasoned dispute.

***See United States v. ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U. S. 997 (1964).

price equilibrium levels, the record of this case is no less complete. Thus, Mr. Morris (President, Edwin H. Morris Co., Inc. and ASCAP Board member) conceded that his antipathy to direct licensing would lead him to refuse to license CBS directly for the same price that he is now receiving from ASCAP in respect of a CBS use:

> "Q. Let us say that the price that CBS is willing to pay you is the same price in effect you are now getting from ASCAP in distributions when CBS uses your music?
>
> "A. No, I consider there is a moral obligation here to the writers with whom I am in partnership with and I couldn't possibly entertain anything of that kind.
>
> "Q. The money would be the same. I am having difficulty understanding that.
>
> "A. The very structure of what I believe would no longer, to me, exist, so I can't see that.
>
> "Q. I guess what I am really asking you, Mr. Morris, is, what is the structure of what you believe?
>
> "A. I believe in ASCAP because of my experiences over the years and it seems to be the only practical way for all elements to do business.
>
> "Q. So you would approach any negotiations with a broadcaster or a network like CBS with a great hesitancy to enter into a direct licensing transaction?
>
> "A. I believe that would be the end of the road for me as a publisher." (D 661-62)*

*The dire consequences predicted by Morris and other publishers to be the result of price competition are considerably overstated. Music publishing corporations now engage in price competition in the licensing of mechanical (phonograph record) and movie rights (where prices are quite high—*see e.g.*, Mingle Tr. 869-70). And while price competition will doubtless reduce prices in the television network field (Fisher Tr. 1664-70, 1737-40; Nathan Tr. 3909, 3984-85; Brackman D 110; Brettler D 190-91), the resultant price levels will still be substantial (Chiantia Tr. 2949-50; Morris D 714, 739; Washington D 944-46). The fact is, however, that publishers and writers fear the worst in the television field; and their antagonism to the prospect of licensing directly in that area was demonstrated time and again on this record (Addenda A-C).

And for Mr. Morris, the price of simply selling an option to CBS (for the sort of "mini-blanket" license the district court suggested CBS acquire, (Pet. App. 113a)) "would have to be in terms so I would never have to worry again of any problems" (D 732-33).

Moreover, 3M certainly paid substantial premiums over fair market values. Messrs. Brettler and Chiantia anticipated receiving as much as $500,000 apiece from their acceptance of the 3M offer for a total of 200 songs (Chiantia D 312), and the mechanical rights portion of those royalties alone was more than five times the total electrical transcription fees paid by Muzak to the *entire* music publishing industry for a three-year license to use more than 3,000 songs (Berman Tr. 841-42; 3M PX's 50, 52). Indeed, the sum involved for each publisher was substantially larger than the total amount each annually receives in ASCAP distributions for the uses of its music on CBS (Addendum B at 5).

Even those amounts, however, were not large enough to save Mr. Brettler the anxiety of having to "wrestle" with this decision (D 236) or Mr. Chiantia the trouble of having to overcome heated intracompany opposition (Arrow Tr. 1365-67; Brettler D 241; Chiantia D 297-305). In fact, he did not even attempt to do so until satisfying himself and other executives of MCA that there was no longer any possibility that ASCAP itself would come to terms with 3M (Arrow Tr. 1351-52, 1361-62; Chiantia D 288-90, 294). As to the comparability of licensing 3M

directly and licensing CBS directly, Mr. Brettler made clear that the CBS premiums would have to be a lot higher:

> "I don't think it is comparable at all to talk about what we did here with a very limited use involving only 700 songs, only for background, at an experimental rate, for an experimental use. I don't think the magnitude of that decision—and I know how long it took me to come to that conclusion; I wrestled with this for a week or ten days. . . .
>
> "Q. Do you believe that a goodly number of ASCAP publisher members would have the feeling right off the bat that they should not license a television network under those circumstances?
>
> "A. Well, I think I indicated in my testimony all along here that I personally have the feeling that direct licensing of television network would be—I think I used the word—self-annihilation as an industry. I think what we are talking about in licensing television networks and what we are talking about in what we did in licensing 700 songs to 3M on a limited experimental basis. . . .
>
> "Q. You think it is night and day?
>
> "A. No, that is only 12 hours apart. I think it is 360 degrees. I think it is more. I think it is grains of sand compared to watermelons." (D 236-37)

It should be emphasized that, while the district court made several findings recognizing the antagonism of publishers and writers to directly licensing CBS,* nowhere in the opinion did the court consider the effect such antagonism would have on the price of any such transactions.

*E.g., the district court found that ASCAP "writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket-licensing system" and "the cited testimony proves" that they "are apprehensive of dealing directly with CBS" (Pet. App. 83a-84a).

Rather, consistent with the central fallacy of the opinion (discussed in the next section of this brief), the court assayed such evidence *only* to determine whether it proved that ASCAP members would boycott CBS in the event it attempted to deal outside the combination. Thus, the finding ultimately made by the court—that they "would deal . . . at least *ex necessitate*" (Pet. App. 90a)—does not diminish, indeed it confirms, the resistance premium factor to which such evidence is actually relevant.*

Quite possibly, the very strength of that evidence, which implies so pointedly that a boycott would in fact occur, may have contributed to the district court's confusion that boycott, rather than impact on competitive price levels, was the relevant consideration.

But when the evidence is viewed in relation to the point to which it actually applies—with all the outright admissions in this record of both the resistance to direct dealing and the price effect—we respectfully submit that any conclusion other than that reached by the court of appeals is intellectually indefensible.

3. The Controlling Fallacy of Defendants' Contention and of Its Endorsement by the District Court Below.

The invalidity of defendants' position that their "retained right" vitiates the price fix is further demonstrated by the very reasoning pursued to that conclusion by defendants and the district court below.

*ASCAP, unable to call back these admissions or otherwise rebut the self-evident economic facts of life which they reflect, sought to discount them by referring to them as "snippets" (*e.g.*, Tr. 1179), and the district court adopted that term (Pet. App. 84a). It implies that the admissions were wrenched from a context which otherwise refutes them. The alleged refutation here? The publishers' and writers' self-serving testimony that they "would deal" if CBS properly urged them to do so and made it worth their while—*i.e.*, that they would not boycott.

For its central holding in the suit, the district court relied exclusively on the authority of two cases—*Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) and *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950)—and the analogy of the single-seller tying decisions to which the rationale of *Zenith* and *Automatic Radio* are related. The reasoning steps, which defendants still endorse (ASCAP Br. 29-31), were as follows:

1. Since a single seller is not guilty of tying unless he "insists" on selling product A with product B and "compels" buyers' acceptance of that condition, a nationwide combination of sellers (ASCAP) is not guilty of price-fixing unless the members "insist" on selling only at the agreed-upon price and "compel" buyers' acceptance of that price (Pet. App. 40a, 42a, 115a).

2. Since it generally cannot be determined whether a single seller is "insisting" on or "compelling" a tying arrangement (or, instead, selling A with B as a "convenience" to the buyer) unless the buyer *asks* the seller to purvey A without B, it generally cannot be determined whether a combination of sellers is "insisting" on, or "compelling" acceptance of, fixed prices unless the buyer asks the individual members of the combination to sell at other than those agreed-upon prices.

3. Here, CBS did not ask ASCAP members to sell at other than the combination's fixed prices. Hence, unless such a request could be regarded as futile—*i.e.*, unless it could be shown that ASCAP members would boycott CBS or that direct dealing was otherwise impossible ("not a viable method for securing the necessary performing rights") so that the buyer was effectively "compelled" to accept the fixed price—the

court cannot conclude that ASCAP members are fixing prices (Pet. App. 53a-55a).

This is the very core of the district court opinion on which everything else hangs or falls. It is fallacious. Indeed, it fails to perceive the most fundamental of antitrust distinctions—*viz.*, that what a single seller may do with impunity (*e.g.*, set his own price or refuse to deal), a combination of sellers may not do at all (*i.e.*, fix prices or boycott).

Thus, the reason that "insistence" and "compulsion" are necessary elements of tying is that, without those elements, the sale by a single-seller of product A with B does not impose a restraint on competition (*e.g.*, *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969)). For, in the tying offense, if and only if the seller "insists" on selling A with B and the tying product, A, is sufficiently "distinctive" to induce the buyer's acceptance of the tie, will the buyer be foreclosed from a competitive market in which to buy the tied product B, and will other sellers of B be unfairly precluded from selling it to the buyer. Moreover, in the context of such a case, the court will have difficulty determining whether the first element—the act of "insistence"—has been met unless the buyer asks the seller not to tie or such asking is demonstrably futile.

In price-fixing, on the other hand, there is a restraint on competition generated by the single fact that otherwise competing sellers have agreed on the price to be charged on all or some of their sales. Such sellers do not have to "insist" on, or "condition," or "compel" *anything*; the agreement itself restrains competition.*

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*As is discussed in Point V below, tying is hardly irrelevant to this case (and was argued below), although a finding of tying is unnecessary to the result. When a combination of thousands of sellers (*viz.*, ASCAP) packages the members' products and markets the

As the court of appeals thus correctly held,

> "Coercion is simply not an essential ingredient of price-fixing." Pet. App. 17a.

POINT II

THE DIVERGENT CONCLUSIONS REACHED BY THE DEPARTMENT (RULE-OF-REASON TREATMENT) AND *AMICI* COPLAND, *ET AL.* (EXCLUSION FROM SECTION 1) ARE AS BASELESS IN LAW AS THEIR COMMON GROUND (PURPORTED "BENEFITS" OF A BLANKET SYSTEM) IS INAPPLICABLE IN FACT TO MUSIC LICENSING FOR TELEVISION NETWORK PROGRAMS.

If price agreements among competitors were actually absolved by "retained rights," which is defendants' principal contention, one would have expected such a point also to have been critical to the Department's and *amici*'s briefs. To *amici* Copland *et al.*, however, another argument is more "crucial"—specifically, one that rests on a comparison between single economic entities (such as partnerships or corporations) and an industry-wide consortium of otherwise competing corporations (such as ASCAP and BMI) (Br. 8-14). To the Department, without the "benefits" that price-fixing by these means is said to confer on publishers and users (which purported "benefits" also underlie *amici*'s analogy to single economic entities), the publishers' "retained right" would be without antitrust significance.

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package through a common sales agency, it is likely to be collectively tying (block-booking); but since the members' authorization of the common sales agent to set the price for the package is also indisputably price-fixing, the decision of illegality need never reach the tying ground.

The fact that the combination is collectively tying does not, of course, warrant the transferal of the rules of the single-seller tying offense (with its elements of "insistence" and "compulsion") to the price-fixing violation. It seems possible, however, that our argument below that ASCAP was guilty of collective tying may have contributed to just such a misapplication of rules in the district court's final opinion.

Thus, the Department is as protective of BMI's price-fixing operation as it is of ASCAP's, even though BMI's exclusivity (and its publishers' lack, on the face of their affiliation agreements, of the so-called "retained right") is unaltered by decree—a fact which the Department also appears to acknowledge (Br. 5 n.6). Indeed, the Department flatly admits that the ASCAP and BMI "decrees are not material to the antitrust analysis of the blanket licenses" (Br. 17 n.13). And it notes with apparent approval that the court of appeals "*recognized* that the availability of alternatives to blanket licensing does not dispose of CBS's price fixing allegations" (Br. 7) (emphasis added). Moreover, while the Department studiously forbears from calling blanket licensing price-fixing in so many words, it observes that otherwise competing music publishing corporations both "agree on the price at which the product is to be sold" (Br. 10) and "on how it [the blanket fee] shall be divided" (Br. 18), which the Department notes in particularly Grundian terms, "thus" gives this system "important features in common with other arrangements that, as this Court has held, are *per se* illegal" (Br. 17). The Department even acknowledges that these agreements impose a "restraint respecting price" (Br. 19). And it appears to concede that for ASCAP to charge separately for each use (*i.e.*, a per-use licensing method), which is far less restrictive than the blanket system and certainly no more the fixing of price, would in fact "eliminate competition among its members" and be price-fixing and unlawful (Br. 4 n.5).

But, to the Department, price-fixing by blanket licensing, unlike that by less restrictive means, should not be declared illegal without a full-scale analysis of purpose and effect, since the Department thinks it perceives certain "beneficial" effects which support what amount to three distinct contentions:

1. Since blanket licensing is "beneficial" for television networks, and since price-fixing is essential to

blanket licensing, price-fixing to television networks is presumptively legitimate behavior (Br. 17-23), despite the undisputed facts (a) that all such purported "benefits" are either (i) non-existent as to networks (claimed "efficiencies"), (ii) no more essential to the production of television programs than they are to the production of motion pictures ("flexibility" and "immediate" access), or (iii) obtainable separately in a competitive market ("broad indemnification," real efficiencies, and perfectly adequate flexibility and access), and (b) that the market here would function as well as any other market without price-fixing, without blanket licensing and on a competitive basis.

2. The "benefits" to music publishing corporations of jointly monitoring music performances may somehow warrant their jointly licensing (and fixing prices on) the uses they monitor (Br. 20).

3. The admittedly non-essential fixing of price to television networks is different from *per se* price-fixing because it can be classified as within the same "species of conduct" as allegedly essential price-fixing to radio stations and bars.

On these grounds, *amici* Copland, *et al.*, assert that blanket licensing is not price-fixing at all, or at least not price-fixing condemned by the Sherman Act (under a rule-of-reason standard or otherwise), because the elimination of competition it inflicts in aid of achieving such "benefits" is no worse than that imposed by (a) any licensing organization, or (b) any "economic unit" (such as a partnership or corporation) (Br. 8-14).

If not already apparent, it will now be shown that each of those arguments is egregiously fallacious—and that the whole is just as illogical as the sum of its specious parts.

A. The Alleged "Benefits" of Blanket Licensing to Television Networks

These "benefits," which, in the Department's mind, so "fundamentally" change the character of the products

as to warrant rule-of-reason treatment for the fixing of their price, consist of:

> "(1) broad indemnification against infringement suits and protection against competing claims for the same work; (2) immediate access to works as soon as they are written; and (3) flexibility in making last minute programming decisions, because all music in the repertory is automatically covered by the license. . . ." (Br. 18)

—as well as alleged reductions in "the cost that would be associated with multiple transactions" (*id.* at 17).

No claim is made by the Department that sufficient indemnification could not be offered by music publishing corporations which did not fix prices—for, of course, it could be (*i.e.*, by each publisher issuing the license, as is now done in licensing performance rights for motion picture use). No claim is made that indemnification would be unavailable from insurance companies—for, of course, it would be. No claim is made that "immediate access" or "flexibility" is essential—indeed, both have been conceded by defendants and found by two courts to be superfluous to a well-functioning market because licensing music, whether new or old, whether "last minute" or with plenty of time, requires only a phone call to the publisher in interest (Pet. App. 9a, 72a-76a). (And certainly, none of these purported "benefits" were cited by the Department in the *NBC* proceeding when it stated flatly to the Second Circuit that the ASCAP arrangement, since "not based," in the context of network broadcasting, "upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation"—citing the very case, *Socony-Vacuum*, which it now seeks to distinguish. (NBC App. 15a).*)

*For a more complete discussion of the inconsistency between the Department's new found position and that which it has previously advocated, *see* pp. 103-04, *infra*. The Department brief referred to is submitted as an Appendix to the *amicus* brief of NBC.

In short, except for music performance rights at a fixed price, the Department has come up with nothing offered by a blanket license that is not separately obtainable in a competitive market or even necessary for the network to obtain. To say that the pooling of these features and rights makes price-fixing less offensive than it would be if they were offered unpooled is palpable nonsense. And the argument does not improve on reference to the supposed transactional "efficiencies," which the Department also cites (Br. 20-21).

In the first place, as this Court has repeatedly held, mere efficiencies do not justify price-fixing. *E.g.*, *United States* v. *Line Material Co.*, 333 U.S. 287, 309-10 (1948). If they did, any industry of otherwise competing sellers could insulate themselves from liability by the simple process of firing two-thirds of their salesmen, leaving the remainder to man the joint sales force of an all-industry cartel.

In the second place, blanket licensing demonstrably generates more, not less, transactional expense than would direct licensing. To be sure, direct-licensing facilities would have to be created (Pet. App. 72a, *see also* note at 29, *supra*); but such start-up costs are normally incident to any company's entry into any market as an individual competitor. And once such facilities were installed, the continuing per-transaction expense would be negligible, entailing little more than a telephone call (Pet. App. 74a-75a; Berman Tr. 829-31, 924; Mingle Tr. 858-60; Nathan Tr. 3891-94).* In contrast, the expenses incurred by having teams of lawyers and businessmen negotiating blanket licenses for periods of months or years, engaging in consent decree proceedings, and then

*Even the Department, while heralding "efficiencies," illustrates them only with reference to radio stations and bars, and states cautiously, "it may be, too, that the economic benefits of blanket licensing do not pertain to certain users" (Br. 20), a reference which must at least apply to television networks, though the Department is loathe so to explicitly concede.

negotiating further with the mediation of the court are self-evidently immense. When there is added to that expense the cost of maintaining the otherwise superfluous ASCAP and BMI distribution systems (*see* pp. 95-97, *infra*), it is perfectly clear that the total cost, pro-rated over each use, exceeds what would be the small expense of each direct-licensing transaction. For, in fact, the Harry Fox Agency covers its full costs of direct-licensing transactions with a commission of 5% or less of each negotiated fee, whereas ASCAP's overhead is 21% of total revenues.

There may be some basis in monopolization cases or in blocking patent cases for concluding that price-fixing which is essential to enable a market to function at all is not unlawful. But to attempt to justify price-fixing as the Department does here—with "benefits" that are nonexistent, nonessential or singly and competitively obtainable—would do true damage to the economy, to say nothing of the "coherence" of the antitrust laws (which *amici* Copland *et al.*, in espousing the Department's contention, profess their interest in maintaining, Br. 8).

Certainly an all-industry cartel of motion picture production companies could offer both movie exhibitors and television networks and stations, along with a blanket license to all present and future movies, "broad indemnification," "immediate access," and the "flexibility" to make last minute changes, not merely in the selection of songs, but in the selection of full programs or theatrical motion pictures to be shown each evening. And certainly price-fixing would be "essential" to that sort of blanket license.*

*The fact that the major motion picture companies were enjoined from "blockbooking" individually, *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), would, presumably, not deter the Department from approving package licensing by a cartel of all movie companies (which featured price-fixing as well as tying) on the principles it has now newly enunciated in its brief in this case.

Similarly, all electronics companies in the world (not merely Hazeltine) could offer, with a blanket license to all present and future electronic patents, "broad indemnification," "immediate access" to new inventions as soon as they were patented, and the "flexibility" to make last minute changes in the invention each manufacturer licensee wished to use. And, again, price-fixing would also be essential to such a license.

For that matter, fully equivalent "benefits" could be offered sponsors by a three-network cartel, fixing prices on advertising time (*e.g.*, $100,000 a commercial, with an "equitable" distribution of time among the programs of all networks), which would also save the advertiser the troublesome expense of shopping around in a competitive market.

Are these really the grounds—these sorts of "benefits" which are not necessary for any market-functioning purpose—on which the Department of Justice wants to encharter cartelization, and displace free competition, as the rule of trade? Indeed, since all the "benefits" cited here are illusory or superfluous, why limit the legalization of cartels to those which offer "benefits" of that sort? Surely industry-wide Committees of manufacturers or service companies are as deserving of cartelization for the transactional savings they could achieve as the music publishing cartel which actually increases transactional expenses.

The Department repeatedly asserts that the ASCAP license is "fundamentally different from anything any [music publishing corporation] individually can market" (Br. 9). Of course, that's right—by definition. Absent a cartel agreement of this nature, MGM cannot market the films made by Gulf & Western (Paramount) and MCA (Universal). But that fact hardly means that those three companies (or, as here, all companies in the industry) would not be fixing prices if they entered into an agreement to appoint a common agent to license a package of their otherwise competing movies at a blanket price fixed by the agent.

The fact is that music performance rights are separate, economically distinct products that are sold competitively on price to motion picture producers, and there is no legitimate reason (and certainly none which will not do violence to the "coherency" of the antitrust laws) why they should not be sold separately and competitively to those same (and other) producers when they are making programs in their studios instead of films.*

B. The Alleged "Benefits" of Joint Monitoring.

The Department speaks warmly of joint monitoring. It adopts uncritically the ASCAP party line that this is the only feasible means the music publishing corporations have for "detecting unauthorized uses" (Br. 20) and was "the impetus underlying the formation of ASCAP" *(ibid.)*. Nowhere does the Department explicitly state that joint monitoring cannot be performed without joint licensing and price-fixing. Yet all the Department's expressed solicitude for a joint monitoring arrangement is meaningless if it is not implicitly in aid of just such a baseless contention.

These points should be noted:

(a) There is an undeniable need for music publishing corporations to conduct some form of monitoring as to the performances of some categories of unlicensed users for the purpose of prosecuting infringements (Nathan Tr. 3862-63; Brettler D 163-64; Fagan D 382). Whether they do so jointly or singly is irrelevant under the antitrust laws, since joint monitoring does not involve price-fixing or, so far as we are aware, any other offense.

(b) By no stretch of the imagination, however, must the publishing corporations who monitor together

*The Department's attempt to exclude blanket licensing from the price-fixing offense on grounds of purported "benefits," is particularly ironic in view of its apparent acknowledgment that per-use licensing by ASCAP would "eliminate competition among its members" and represent the fixing of prices (Br. 4 n.5), when per-use licensing offers all the "benefits" claimed for blanket licensing on less restrictive terms.

also license together, let alone fix prices in the process. Joint monitoring can be conducted as to the performances of any category of user, while the participating publishers are directly and individually licensing those users. There is simply nothing inherent in the nature of monitoring—which consists of nothing more than detecting and identifying performances of music—that requires those who do it to license by cartel. [Fisher Tr. 1653-57; Nathan Tr. 4041-42; Fagan D 542-43]

(c) That does not mean that there is no connection between joint monitoring and joint licensing—for there is. But it is a connection that cuts against, and refutes, the argument the Department is trying to make. For while joint monitoring does not require joint licensing, joint licensing not only requires joint monitoring but a joint monitoring process vastly more elaborate and expensive than it need be. Indeed, in the absence of the joint licensing of television networks, there are strong grounds for believing that there would be no need for monitoring network uses at all.

(d) Thus, if licensing were done directly, fees would be paid directly (*i.e.*, by network or producer to music publishing corporation). Since ASCAP would have nothing to do with the collection or distribution of such fees, it would have no distribution system, and obviously no need to monitor for that purpose. Saved would be the presently enormous expense of ASCAP's administration of its elaborate computerized distribution system (now required to allocate portions of annual lump sum royalties to ASCAP members), the expense of taping selected network programs and reviewing all network logs and cue sheets, and the cost to the networks of preparing those logs and cue sheets in the first instance (E 209; *see* pp. 25-28 *supra*).

(e) Moreover, in the absence of blanket licensing, it is highly unlikely that music publishing corporations would monitor network programs (through ASCAP or otherwise), for the purposes of detecting infringements, on more than a spot-check basis, if even that (Fagan D 430-32). Right now, they conduct *no* systematic monitoring of phonograph record company uses (which must annually run in the hundreds of thousands) and no monitoring whatever of motion picture company uses (Berman Tr. 840-41, 931-33; Mingle Tr. 883-85). In essence, those user industries are self-policing—a system which works because the penalties for infringement are severe and the possibility of detection high (even in the absence of formal monitoring) (Mingle Tr. 884-85). Since any network infringements would be equally detectable, and the infringement penalties even more severe (particularly given FCC considerations, as well as the express provisions of the copyright laws), self-policing should be at least as effective in the network area as it is for phonograph records and movies.

In short, the Department's contention has the facts exactly backwards. Not only does the present need for the joint monitoring of network uses fail to justify fixing prices on those uses, but the removal of the price fix would obviate the need for, and eliminate (or at least vastly reduce) the present wasteful expense of, elaborately monitoring network uses. In fact, since ASCAP and BMI now *both* monitor *all* television network uses, the potential savings include, not merely the cost of one immense joint monitoring system, but two.

C. The Alleged "Necessity" of Price-Fixing to Radio Stations.

Defendants' traditional defense to price-fixing and other antitrust offenses inherent in their cartelization has been market-functioning necessity.•

•If such a concept has any basis in law, as a defense to cartelization, it must be limited to markets (if any) in which the transactional expenses are prohibitively high (in the sense of effectively precluding direct dealing) or in the blocking patents situation (*see International Manufacturing Co.* v. *Landon, Inc.*, 336 F.2d 723 (9th Cir. 1964), *cert. denied sub nom. Jacuzzi Bros., Inc.* v. *Landon, Inc.*, 379 U.S. 988 (1965); *see also Standard Oil Co.* v. *United States*, 283 U.S. 163, 171 (1931). It may well be true that the licensing of radio stations presents such a market; but that, by its nature, is a question of fact which was not litigated in this case nor, as far as we know, decided in any prior case.

On that ground, ASCAP defended its system in 1956 before a Congressional investigating committee,• the Solicitor General endorsed the "result" (not the reasoning) in *K-91*,•• the Department reiterated its qualified approval of price-fixing to radio stations in the *NBC* consent decree proceeding,† and the district court in this case directed a trial in denying ASCAP's motion for summary judgment.††

If there is any factual issue now clearly resolved in this case—made clear by pretrial discovery, agreed to by all parties, and found by two courts to be so—it is that there is no "necessity" of any kind for music corporations to fix prices, or to engage in collective licensing, *vis-a-vis* television networks (Pet. App. 21a, 37a-38a, 112a).

Nevertheless, the Department of Justice cites what plainly amounts to a "necessity" ground (Br. 20-21) in its assertion that price-fixing by music publishers, unlike that committed by any other group of sellers in the United States, should be entitled to rule-of-reason, rather than *per se* treatment. The "necessity", which the Department perceives, is not, of course, any "necessity" applicable to the licensing of television networks (or, for that matter,

•ASCAP's general counsel for more than 40 years, Herman Finkelstein, testified that:

> "An organization like ASCAP or BMI or anybody else should not be permitted to combine in great numbers unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the non-dramatic performing rights because in all other fields the writer and the publisher can shift for themselves, and so can the user." (Tr. 3679)

•• Memorandum for the United States as *Amicus Curiae*, *K-91, Inc.* v. *Gershwin Publishing Corp.*, 389 U.S. 1045 (1968), Dep't App. 7a, 12a-13a; JA 124, 130-31.

†NBC App. 15a.

††*Columbia Broadcasting System, Inc.* v. *ASCAP*, 337 F. Supp. 394, 400 (S.D.N.Y. 1972).

television stations or radio networks); it is an alleged "necessity" applicable only to radio stations and lesser (in terms of fees paid) users such as skating rinks and bars.• In fact, that position (which is set forth most clearly at p. 21 n.17) is the linchpin of the Department's brief.

We submit that that contention is not simply wrong but, in a brief filed by the United States Department of Justice, peculiarly off-base.

The first question that naturally presents itself is, *why?* Why should the supposed "necessity" for fixing prices to one group of customers (radio stations and bars) create eccentrically favorably legal treatment for price-fixing to another group of customers (*e.g.*, television networks) as to which no such "necessity" exists? As to which, indeed, cartel-licensing is demonstrably inefficient from the standpoint of transactional expense. What conceivable value is the Department trying to protect?

There has never been any argument in this case by the Department or any defendant—and none could be substantiated—that music publishing corporations would somehow be precluded from cartelizing their dealings with radio stations if they could not fix prices to television

•The Department blurs the distinction among these different users by stating that "the nation's television and radio stations perform ASCAP music more than one billion times annually" (Br. 21), citing an unpublished pamphlet by Dr. Joel Dean, *The ASCAP Survey: Its Design and Objectives*, which is part of the record in this case (E 212). The estimate of more than a billion playings refers to *all* users of ASCAP music, *not* merely television and radio stations (E 218).

The number of network television performances of published ASCAP compositions is a minute fraction of that total amount. The district court found that for CBS to obtain direct licenses for all its uses of outside music (*i.e.*, music not written for a specific show), would involve approximately 4,000 to 8,000 transactions per year (Pet. App. 74a). The court also suggested that these relatively simple transactions could be further "streamlined" through the use of computer technology (Pet. App. 75a).

networks. Or does price-fixing by music publishing corporations stand on such a high and worthy footing in the judgment of the Department that even the symmetrical purity of that practice (which can be realized by upholding it as to all users) must somehow be preserved?

As nonsensical as that proposition sounds, it seems to be precisely what the Department brief is saying. It labels price-fixing by music publishing corporations on performance rights as a "species of conduct" (Br. 21 n.17). Since one part of the Department's "species" (price-fixing to radio stations) is arguably "necessary," and thus, in the Department's mind, entitled to rule-of-reason treatment, then all parts (including price-fixing to television networks) must also be subject to that rule—and the so-called "special circumstances" applicable to television networks (*i.e.*, the lack of any such "necessity") deemed insufficient to "sap" this behavioral "species" of its justification *(id.)*.

The fallacy is so self-evident it is difficult to believe that the Department has actually uttered this contention. Since classifications of modes of behavior are almost infinitely variable, it is easy enough to place otherwise illegal conduct in the same "species" as arguably protected conduct, if that is the result one wants to reach. But that is simply arguing from conclusion.

No system of classifying conduct (or anything else) makes sense unless the distinctions used to divide conduct into classes reflect the *purpose* for which the classification is made. For example, if one were classifying for the purpose of distinguishing between the licensing of intangibles and the sale of hard goods, it would be sensible to include the licensing of radio stations and television networks in the same "species." But here we

are classifying for the purpose of determining which kind of price-fixing is "necessary" and which is not, since the sole, even arguably recognized ground of justification is "necessity." To perform that classification, one must ask, necessary for whom? If there is a group of similarly situated customers for whom price-fixing is *not* necessary, then the practice as to those customers obviously belongs in a different "species" than that as to customers, if any, for whom price-fixing *is* necessary. On that distinguishing fact, price-fixing *vis-a-vis* television networks and movie producers is in the same "species" of conduct, whereas price-fixing *vis-a-vis* radio stations and bars (assuming, *arguendo*, the validity of the Department's assumption of "necessity" with respect to those users) is in another "species" of conduct.

Indeed, if, as the Department advocates, the licensing of performance rights to radio stations and television networks can be lumped together in one protected "species," on what ground does the Department segregate out of that "species" the licensing of precisely the same rights to movie producers? The fact is that, on the same illogical premises, music publishing corporations would now be entitled to rule-of-reason treatment if they once again combined to fix prices on movie performance rights where there is no more "necessity" for so doing than there is with respect to network performance rights.

Or, by a parity of "reasoning", one could argue that price-fixing on patents is one "species of conduct," so that the "necessity" to fix prices on blocking patents warrants rule-of-reason treatment for doing so on nonblocking patents.

Surely this is dangerous as well as fallacious reasoning, particularly for the Department to espouse. The so-called "special circumstances" that the Department feels are

insufficient in themselves to entitle CBS to buy in a competitive market are the very circumstances that are almost universally applicable to the buyers of any commodities or rights (the *lack* of market-functioning necessity for price-fixing *vis-a-vis* those buyers). Hence, for the sake of not "sapping" the purported justification for the ASCAP and BMI cartels, the Department would blunt the one sharp tool of antitrust enforcement (the *per se* rule) which it is signally responsible for wielding.

And surely the Department, in its talk of "special" circumstances or treatment, has misperceived the direction in which the Sherman Act thrusts. The principal prohibition of the Act is against sellers' collusion on price—whether their collusion is aimed at a single group of similarly situated buyers or all buyers to whom they sell. If any treatment can be deemed "special" under the antitrust laws, it is that only arguably accorded, and, if so, strictly confined, to the minimum extent of collusive activity which is essential for market-functioning purposes. To expand that special treatment by lumping buyers for whom price-fixing is nonessential with those for whom it is essential into some fictitious "species" of presumptively legitimately victimized targets is to place sophistry above common sense. To do so for the purpose of leaving noncompetitive any marketplace that could otherwise *be* competitive simply stands the Sherman Act on its head.

Moreover, this new-found position of the Department is blatantly inconsistent with that it has carefully taken in the past before this Court and the Second Circuit. Thus, in *K-91*, the Department stated in its brief to this Court,

> "Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (*cf. Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated." (Dep't. App. 12a; JA 130)

Plainly, for "collective activity" to be extended from (a) price-fixing to radio stations, to (b) price-fixing to television networks, means exactly that it has gone "further than absolutely necessary" and should no longer be "tolerated."

The Department now claims that the above-quoted statement from its *K-91* brief did not mean that the normal *per se* treatment of price-fixing should apply to price-fixing *vis-a-vis* users which has gone "further than absolutely necessary" and that the Second Circuit, in so concluding, "has misread that brief" (Dep't Br. 21-22 n. 18). To the extent (if any) that statement might appear ingenuous on its face, the impression does not linger on reference to the Department's own prior statement to the Second Circuit in the *NBC* proceeding, regarding the meaning of its *K-91* brief and the *per se* illegality of ASCAP's price-fixing where no market-functioning necessity is proven to exist:

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar

> concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* anti-trust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1950)." NBC App. 15a.

What is the reason, then, for this extraordinary reversal of position by the Department? Given its own further statement in the *K-91* brief—

> "As conditions change [footnote omitted] or abuses are disclosed, it may become necessary as in 1950 [citation omitted], for the government to seek modification of that decree or to file suit for additional relief." Dep't App. 12a-13a, JA 131.

—and given "absolute necessity" as the sole stated premise for "tolerating" this combination—the day that ASCAP conceded the lack of such "necessity" in this case is the day that the Department should have sought such "modifications" or filed "suit for additional relief." At least that should have happened when the district court in this case made a finding of lack of "necessity." And certainly that should have happened when the court of appeals affirmed that finding and ruled that price-fixing was being committed.

What the Department states, however, is its purported concern about eroding the *per se* rule with a market-functioning-necessity exception (a purported concern heatedly shared by defendants and *amici* Copland, *et al.*). We believe the term "purported" is warranted by the fact that, of the several possible methods of treating a market-necessity contention, the proposal the Department, defendants and *amici* advance would import far

more mayhem to the province of the *per se* rule than any such exception. The possibilities are:

1. *Per se illegality irrespective of any market-functioning necessity contention or proof.* This Court so held by necessary implication in *Watson* v. *Buck*, 313 U. S. 387, 398, 403-05 (1941), with respect to this very cartel. The cartel's alternative under such a rule is to seek Congressional authorization for those of its activities which are demonstrably essential.

2. *Per se illegality, except where the defendants both plead and prove that collusive selling is absolutely necessary in order to enable the market to function at all*—a test adopted in *dicta* by the court of appeals in this case (Pet. App. 21a n.26).

3. *Where the defendants have pleaded market-functioning necessity, an analysis labeled "rule of reason" but limited to a determination of whether they have proven such necessity.* Such a rule would be identical in operation to the application of a *per se* test with a market-functioning-necessity exception. It is also the test advocated by the Department in *K-91* and *NBC* and, except for the burden of proof, the standard adopted by the district court below in its decision denying ASCAP summary judgment•.

4. *Where the defendants plead market-functioning necessity for fixing prices to the plaintiff and similarly situated buyers, a rule forcing the plaintiff-victim of the price fix to*

•The Court did so on analogy to a statutory regulatory scheme citing *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), which was inapt, since a market-necessity contention for price-fixing without congressional approval is hardly equivalent to that which has been given explicit statutory recognition. But it is impossible to conceive how the district court could have concluded that defendants, who asserted a "necessity" defense to what the court itself branded as "price fixing which would otherwise be illegal *per se*" (337 F. Supp. at 400), could somehow manage to cast the burden onto the plaintiff of proving the negative of any such "necessity."

prove a full-scale rule of reason case—i.e., not only by proving a negative (the nonexistence of any market-functioning necessity), but also by proving that the anticompetitive purposes and effects outweigh, in terms of social and economic desirability, any claimed benefits of the defendant-sellers' collusion. As extreme and ill-reasoned as such a rule might appear, the Department's proposal, which is the fifth, is more extreme and doubly fallacious.

5. *Where the defendants plead market-functioning necessity for price-fixing vis-a-vis some customers, a rule forcing the plaintiff-victim of the fix, as to whom no such necessity is claimed, to prove a full-scale rule-of-reason case.* It is this position which the Department, apparently in earnest, proffers to this Court (and which is, of course, championed by defendants and *amici).*

It is clearly unnecessary for the Court, in this case, to choose between the first rule and the next two (which are functionally identical). None of them, by definition, could be invoked in the absence of a claim of market-functioning necessity; no such claim exists here; the very opposite has been conceded and found.

As to the fourth and fifth alternatives, it is difficult to imagine any proposal more destructive of antitrust enforcement efforts (short of the complete abolition of the *per se* rule) or more contrary to rational evidentiary principles. In essence, the antitrust plaintiff, whether a "private attorney general" or the Department itself, is "had" by that rule in at least four ways:

1. By the mere unproven (and possibly specious) assertion of "necessity" for price-fixing, the cartel-defendants would manage to convert what is otherwise a *per se* violation of the Sherman Act into a practice measured by rule-of-reason standards.

2. Although the unproven assertion which is given such substantive effect is limited to market-functioning necessity, the rule-of-reason test which the Department supports would not be so confined, but rather require a full-blown analysis of purposes and effects.

(It should have been apparent to the Department that, if a defendant combination can prove that price-fixing is essential, then, to the extent market-functioning constitutes a defense (whether labeled an exception to the *per se* rule or a specially limited rule-of-reason doctrine), that combination should prevail. On the other hand, if such "necessity" cannot be demonstrated, then that combination should stand in exactly the same shoes as any other combination. The only difference would be that, in one case, the cartel would have raised a specious argument of "necessity," and in the other case, the cartel would have elected not to advance the contention.)

3. Instead of the cartel-defendant having to carry the burden of proving a "necessity" justification for price-fixing, the Department's proposal would place on the plaintiff the burden of disproving "necessity" and any other conceivable justification.

4. And, with the greatest irony of all, those three deprivations will have occurred, not because an unproven assertion of "necessity" was made with respect to the plaintiff or similarly situated buyers, but because it had been argued with respect to another group of buyers who were not involved in the case.

Those, in net effect, are the guidelines under which the Department proposes we retry this case• (and,

•By ignoring a substantial part of our brief to the Second Circuit, the Department even suggests the possibility that the unreasonableness of the restraints imposed by these cartels may not have been argued to the Second Circuit and thus the case might have to be dismissed. We deal with that suggestion at pp. 142-43, below.

presumably, those under which future antitrust plaintiffs, including itself, must try price-fixing cases in which assertions of "necessity" have been made). We have noted the inconsistency of this proposal with antitrust and evidentiary precepts, as well as with the Department's own prior utterances on the subject (*supra*, pp. 97-107); it should now be evident that it would also effect a denial of due process of law.

D. The Alleged Analogy Between Integrated Economic Units (Such as Partnerships and Corporations) and Price-Fixing Cartels.

Based ultimately on the same misperceived or inapposite "benefits" to which the Department alludes, *amici* Copland, *et al.*, assert that the ASCAP pool of otherwise competing copyrights is no different from the integrated service offered by a law firm or the manufactured product of a corporation (Br. 12-14). Thus, they reason, since such a firm or corporation is not fixing prices on its service or products when it sells them at a given price, otherwise competing music publishing corporations are not fixing prices on their copyrights when they charge a fee for a blanket license to their pool.

This, we submit, is pushing analogy beyond common sense; but it is instructive to identify the fallacy.

The proprietor of a law firm (be it an individual proprietorship, partnership or corporation) hires (*i.e.*, purchases the services of) young lawyers, stenographers, messengers and others, transforms those services into a finished product (for example, the capability to handle large litigation) and resells that product to buyers (clients). Moreover, it is evident that considerable effort, talent and

capital must be added to, imposed upon, and integrated with the abilities of such personnel—in terms of training, education, the development of firm memoranda and forms, the acquisition of physical resources and much more—in order to achieve an effective result. Thus, that finished product is different in kind from its individual elements, in much the same sense that the finished product of a play or motion picture is different in kind from the individual services rendered by actors, authors, directors, costume makers, etc.*

Hence, neither the proprietor of a law firm nor the proprietor of a film is fixing prices on the underlying elements of his product in his transactions with clients or film exhibitors, any more than the manufacturer of an automobile is fixing prices in his transactions with car buyers on the raw materials and services he has transformed into a motor vehicle. For neither the client-buyer of a law firm's services, the exhibitor-buyer of a film, nor the purchaser of an automobile is *in* the market for those underlying elements—they are sold in a different market, the one in which the proprietor or the manufacturer buys.

Indeed, the market in which the law firm sells its product (different in kind from the services of a single, individual lawyer) and the market in which the automobile manufacturer sells its product (different in kind

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*Or to use the analogy argued below, as the court of appeals viewed it:

> "ASCAP analogizes a blanket license to a symphony orchestra, in which the ensemble is different from the individual musicians and which may therefore lawfully command a price which is different and higher than the price for each musician's performance. The fallacy is that when the orchestra plays as an ensemble it represents the only product of its kind. Here each composer, by contrast, records his own solo for separate broadcast. The musicians in an orchestra are not competitors; the contributors of copyrights for the blanket license in many situations are, and it is their price competition among themselves that is affected by the blanket license." Pet. App. 20a-21a.

from that capable of being produced by an individual mechanic) would not even exist, but for the economic integration involved. In that sense, that integration is truly necessary for the functioning of those markets.

On the other hand, if all law firms in the country agreed to have the Executive Committee of the ABA sell their products at prices fixed by the Committee—whether at $500 an hour, or a retainer of 10% of each client's annual income for all services the client could possibly use for the year—the *per se* violation of Section 1 would be apparent. In all respects pertinent to the antitrust laws the imposition of such a restraint is substantively identical to what all music publishing corporations in this country now do through ASCAP and BMI.

Furthermore, to follow the progression of *amici*'s analogy, if all law firms in the nation merged into one, they would no longer be guilty of price-fixing (by definition), but would have committed a *per se* violation of Section 2. For since the merged entity would clearly possess monopoly power, and since its acquisition of that power would have been indisputably "willful," the objective standards of Section 2 would have plainly been met, with no need to pause for further analysis of purposes or effects.•

•While the Department agrees, on this ground, that *amici*'s analogy to law firms is "unpersuasive," its discovered admiration for the rule of reason, rather than the *per se* rule, leads it to conclude that "a merger of every law firm in Washington, D.C., would raise serious antitrust questions under the rule of reason" (Br. 23-24 n.20). If Washington, D.C., as we suspect, is a separate geographic market, such a merger would be unlawful *per se*. "[M]onopoly power achieved by combination is *per se* unlawful under Section 2." D. Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 293 (1956).

But, say *amici* (Copland Br. 10-14, Dep't Br. 17-23) and defendants (ASCAP Br. 8, BMI Br. 21-29), ASCAP and BMI too add something to their pools of otherwise competing copyrights— "indemnification," "access," and "flexibility" (*i.e.*, the Department's "benefits" just discussed).

True enough, but quite irrelevant to whether prices are being fixed on those copyrights.

The addition of such elements does not transform the nature of the copyrights into something else.• Here again, if otherwise competing sellers could fix prices with impunity simply by adding other products, services or rights to what their common-sales agency markets—or "conveniences" which the buyer has been found (as here) not to require—that escape hatch from Section 1 would emasculate the statute.

To be sure, *amici* Copland, *et al*, assert that this consortium of publishers is "vital" (Br. 10).•• For what? As is true of the Department, *amici* cite the purported

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But even if the Department were right, and even though a merger of *several* firms in a market consisting of hundreds would not be unlawful *per se*, those results fail to help these defendants, because they have cartelized *all* firms rather than several, and because this is a Section 1 case as well as one brought under Section 2.

•Any more than would an ABA price-fixing Committee change the nature of the law firm services by adding such features as instant advice as to which firms were expert and immediately available, access to a supplemental pool of para-legals, the right instantaneously to change firms with transitional services and the automatic transmission of files, and many others that might be imagined.

••And thus, also say *amici* Copland, *et al*, it "must exist" (Br. 11). But there is no issue in this case concerning its existence; our claims are directed to its practices.

"necessity" to engage in joint monitoring (Br. 10)—without reflecting on the unanswerable point that joint monitoring does not require joint licensing, much less the fixing of price.

And for whom? *Amici* Copland, *et al*, cite (Br. 11), as does the Department, radio stations and bars without troubling to address the fact that defendants not only conceded, but affirmatively argued, and two courts have found, precisely the lack of any such necessity.

And it should be noted, to complete this particular loop, that if price-fixing to television networks were actually "vital" in the sense that programs could not be produced in the absence of that practice, that would not change the fact that prices were being fixed. It would, however, require the application of the "least restrictive alternative" test, and thus require the imposition of a per-use (rather than blanket) licensing system. But, of course, it is not "vital" or even close—that is the one point on which all parties and both courts are in total agreement.

As to *amici's* analogy to joint ventures (Br. 10-12) (or ASCAP's to "cooperatives" (Br. 9), one wonders which side they are on. For when joint ventures (or cooperatives) are used by otherwise independent entities as instrumentalities for fixing price, they are just as illegal *per se* as price-fixing combinations that are not dressed up in such economic entity form. This Court has so held repeatedly. *E.g.*, *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969); *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967).

As to sports leagues (Copland Br. 10): though they have far different characteristics from a consortium of music publishing corporations, and while baseball has

been exempted from the antitrust laws under aberrant circumstances, no team corporations have been given authorization by this Court to fix prices; and the competitive restraints permitted by the lower courts have been judged by what amounts to a "necessity" standard. *Smith* v. *Pro Football, Inc.*, [1978] 5 Trade Cas. (CCH) ¶ 62,338, at 76,035, 76,038-39 (D.C. Cir., Nov. 9, 1978); *Mackey* v. *National Football League*, 543 F.2d 606, 622 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

Finally, as to the supposed "inherency" of price-fixing in "any licensing organization" (Copland Br. 7), it must be noted that the Harry Fox Agency is a licensing organization that does not fix prices. It negotiates prices separately for, and at the independent direction of, each music publishing corporation.

Amici Copland, *et al*, implicitly acknowledge that fact with the curious contention that ASCAP cannot be made to act as "an internal bidding system" (as does Fox) for the benefit of CBS when it would be "commercially impossible" for it to do so for all users (Br. 12). Fine—whether true or not. It is not the object of this action to get ASCAP to conduct "an internal bidding system," but to oust ASCAP from this market.• The point persistently elided by these *amici*, which indeed is the short answer to this suit, is that ASCAP is an anticompeti-

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•The fact that CBS has forborne from demanding a forfeiture of copyrights as to music-in-the-can in no way diminishes its desire to free this market from the ASCAP apparatus. The only alternative solution to the music-in-the-can problem would be a limited per-use licensing system for those uses. CBS's own self-interest would obviously make forfeiture more desirable.

As to a full per-use system (in lieu of a straight injunction against price-fixing), its utility is principally as an interim measure which, in the unusual circumstances of this case, might actually remove ASCAP from the market more quickly than the straight injunctive alternative (*see* Point IX, below).

tive anachronism which no one but its members desire to maintain in this market for any purpose at all.•

POINT III

THE INJURY THREATENED CBS IN ANY ATTEMPT TO BY-PASS THE ASCAP FIXED PRICE PRECLUDES A HOLDING THAT SUCH AN ALTERNATIVE LEGALIZES THE PRICE-FIX, EVEN ASSUMING, CONTRARY TO LAW, THAT ALTERNATIVES WERE RELEVANT TO A DETERMINATION OF WHETHER PRICE-FIXING IS UNLAWFUL.

We showed in Point I that the district court, reasoning by analogy to the single-seller tying decisions, concluded that a combination of sellers could not be held guilty of price-fixing unless their customers were "compelled" to buy from the combination at the fixed price. In the court's view, such compulsion could only be found if CBS could prove that the bypass-alternative (*i.e.*, filling its music requirements by direct licensing) was "nonavailable" (Pet. App. 50a) "impracticable" (Pet. App. 39a), or "not a viable method for securing the necessary performance rights" (Pet. App. 55a), in that the publishers and writers would boycott CBS or that the transactional problems were insurmountable.

Since the tying analogy is inapt, the conclusion erroneous, and price-fixing an enjoinable offense whatever the buyer's alternative may be, that claim should be decided, as it was by the court of appeals, without reference to either the existence or the height of the barriers that stand in the way of that alternative.

•Hence, *amici*'s further point that the court of appeals' "objection would apply unless members bid competitively through ASCAP" (Copland Br. 10) is equally confused. The court of appeals' objection applies to an agreement to make sales without competitive bidding. Neither the court nor CBS has evinced any desire that publishers start bidding "through ASCAP." In fact, given the history of this organization, it is extremely unlikely that any bids made "through ASCAP" would *be* competitive (*see* Addenda A-C).

But even assuming, contrary to law, that a buyer's alternatives to succumbing to a fixed price were relevant to a determination of legality, we show, in this Point III, (a) that their mere "viability" or "availability" could not rationally be held to vitiate a price-fix, if they threatened the buyer with competitive disadvantage or other loss; (b) that the threat to CBS inherent in the bypass alternative here is supported by the district court's own findings of fact, since they depict such disadvantages and loss even while holding the alternative "viable" and "available"; and (c) that the record establishes by uncontroverted proof (which no findings contradict) that CBS would in fact sustain such competitive disadvantage and loss if it attempted the bypass alternative.

A. Price-Fixing, an Offense That Is Not Made Lawful by the Availability of Alternatives, Is Certainly Not Made Lawful by the Availability of Alternatives That Are Likely To Cause Competitive Disadvantage or Other Loss.

It is obvious that a buyer-alternative to the acceptance of a fixed price may be "viable" and "available" yet promise significant competitive disadvantage or other penalties or loss. In that event, the alternative is not likely to be resorted to by any buyer, and the price-fix will remain in place. Since such an alternative will fail to remove the restraint in fact, there is no reason in antitrust policy why it should be held to absolve the restraint in law.

Not only, however, did the district court fail to attach legal significance to the disadvantages and penalties inherent in a "viable" bypass alternative, by holding them to be "largely speculative" (Pet. App. 113a•), and by

•Evidence of bypass disadvantage that the court did not treat as speculative—for the court did not mention it at all—consisted of direct admissions by defendants that a bypass in today's world was completely impracticable (Addendum E; *see also* pp. 121-22, *infra*).

repeatedly noting CBS's failure to resort to that alternative in lieu of bringing this suit so as to obtain "hard evidence" (Pet. App. 73a) that was not "largely speculative," the court made it apparent that the only way to meet its test—*i.e.*, to demonstrate that a bypass was "not a viable method"—was for CBS actually to try that alternative and fail in some measurable degree. Indeed, the court stated,

> "CBS is not entitled to relief in this suit simply for the purpose of insulating it from the risk of competitive disadvantage vis-a-vis other networks if it makes the business decision to experiment with a new method of music licensing." Pet. App. 78a.

It should be noted that this "*new method*" referred to as a subject for "*experiment*" whose "*risk*" is not to be relieved hardly represents some novel concept of how products should be bought, as the court's statement seems to imply, but the very method of purchase which the Sherman Act is principally designed to protect: buying in a competitive market.

Moreover, the "speculation" perceived by the district court was inherent in its own framing of the issues. The issue cannot, logically, be whether a future event (*i.e.*, a boycott or tripping on transactional obstacles) will actually occur but whether the problems inherent in existing conditions constitute a material threat. We believe it to be self-evident that the policy favoring access to competitive markets is sufficiently strong that a buyer confronted with a fixed price from a consortium of sellers is not required to choose between the acceptance of such an arrangement and an alternative that threatens appreciable competitive disadvantage or other loss, let alone actually to incur that loss as a precondition of suit—but rather, on those facts, can obtain an injunction against the continuation of the price-fix.

A buyer from a price-fixing combination always has, theoretically, some alternative to capitulation—*e.g.*, with enough time and money, he can wheedle or bribe the sellers out of their combination; he can even manufacture the product himself. If buyers had to actually resort to transparently disadvantageous alternatives as a pre-condition to suit, the private injunction action provisions of the antitrust laws would be effectively repealed.

Indeed, the result of the district court's ruling, if adopted on appeal, would not be merely to protect a price-fix whose buyer-alternatives were obstructed by threatened disadvantage or penalty. It would actually *reward* combinations of sellers, such as those involved here, *in direct proportion to the height of the barriers that they could erect against the possibility of price competition*. The more obvious and potentially harmful those barriers were—and thus the longer the combination could forestall buyers' attempts to gain direct access to its members—the longer would it be impossible for buyers to prevail in antitrust litigation. So long as no buyer tried the alternative and actually failed, the combination would have to be allowed, under the district court's theory, to continue to stifle competition; for absent such a demonstrated failure, proof of threatened disadvantage would be both insufficient to meet the court's legal test (since it would not rise to the level of "non-viability") and "speculative" as an evidentiary matter (since it would not be "hard" evidence of suffered loss).

The antitrust laws obviously countenance no such bizarre results.

It is, of course, firmly established that *actual* competitive disadvantage satisfies the injury element of Section 4 of the Clayton Act (15 U.S.C. § 15 (1976)) and thus supports a suit for treble damages. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 260 (1946); *also see, e.g.*,

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Hence, *threatened* competitive disadvantage is "threatened loss or damage" within the meaning of the injunctive provisions of Section 16 of the Clayton Act (15 U.S.C. § 26 (1976)). If the buyer from a price-fixing combination could not enjoin that restraint, unless he first availed himself of an alternative that threatened competitive disadvantage, he would be forced to exchange one form of potential injury cognizable under Section 16 for another. Not even the inapt analogy of the tying decisions, relied on by the district court, would support that sort of statutory confusion.

In the tying decisions, the element of "compulsion" is satisfied by a showing of the "distinctive" nature of the tying product; and that is clearly established when it is shown that the likely disadvantages to the buyer of resorting to an alternative for the tying product form sufficient leverage to induce the buyer's acceptance of the tie. *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 619-21 (1977); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 503-04 (1969); *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962). Thus, the present *arguendo* assumption of the relevance of buyer-alternatives to the acceptance of a price-fix would require an analysis—not of whether the alternatives were "non-available" or "non-viable", as the district court held—but whether, as is done in the tying cases, the likely disadvantages to the buyer of not accepting the fixed price form sufficient leverage to induce an acceptance.

While we obviously believe even that question to be superfluous, there is plainly no need to ask more than that question.

Although there are no price-fixing decisions which expressly state a standard by which buyer-alternatives are tested—since "compulsion" has never before, to our

knowledge, been considered by any court to be an element of price-fixing—there are cases dealing with other Section 1 offenses that apply *a fortiori—e.g.*, the boycotting decisions such as *Associated Press* v. *United States*, 326 U.S. 1 (1945) and *Gamco, Inc.* v. *Providence Fruit & Produce Bldg. Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

In those cases, combinations of sellers were accused of boycotting because of restrictions they imposed on certain buyers' access to the sellers' "product" (the AP news service; space in Gamco's Produce Exchange Building).* In both cases, the defendant combinations sought to defend on the ground that there were alternatives available to the buyers (UP and INS news services; the adjacent building and the one across the street). In each case, the Court rejected the alternatives as a matter of law because of the likely disadvantage inhering in them. As stated by this Court in *Associated Press*, "a newspaper without AP service is more than likely to be at a competitive disadvantage" (326 U.S. at 17-18).

There is no difference favorable to ASCAP between those cases and this one. If disadvantages likely to inhere in the alternatives to a boycotted product are sufficient to make a boycott charge stick, then disadvantages likely to inhere in the alternative to accepting a combination's fixed price must also be sufficient to make the charge of price-fixing stick. The fact that the alternative in the price-fixing case consists of pulling the sellers out of their own combination, and in the boycott case consists of both that and seeking alternative sources of supply, is a distinction that cuts against defendants, not for them. And, in all events, in both cases the likelihood of disadvantage will preclude the alternative from relieving the anti-competitive effect.**

*Restrictions, incidentally, that exceeded the minimum extent necessary to serve the market-functioning purposes for which those combinations were permitted to exist.

**Indeed, if the offense is price-fixing, that effect will obtain even if the alternative is resorted to (*see* Point I. D).

Of course, one obvious test for determining whether disadvantage is likely to inhere in an alternative to an anticompetitive practice is whether the practice has worked—*i.e.*, whether the victims have capitulated so that the anticompetitive impact has been felt. And that was exactly the test applied by this Court in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964).

There, a resale price maintenance scheme was sought to be defended by the manufacturer, Union Oil, on the ground that the dealer-plaintiff had signed the offending agreement and could have bought oil elsewhere if he wanted to cut resale prices (*i.e.*, avoid the injury stemming from Union's restriction on his ability more effectively to compete). This Court held:

> "The fact that a retailer can refuse to deal does not give the supplier immunity. . . .
>
> "There is actionable wrong whenever the restraint of trade . . . has an impact on the market. . . .
>
> "The exclusive requirements contracts struck down in *Standard Oil Co.* v. *United States*, 337 U.S. 293, were not saved because dealers need not have agreed to them, but could have gone elsewhere." 377 U.S. at 16-17.

Again, there is no distinction favorable to ASCAP between the grounds for decision in *Simpson* and those indicated here. In *Simpson* the dealer/buyer-plaintiff sought to avoid participation in a price-fixing combination. Here, the plaintiff-buyer seeks to avoid acceptance of a fixed price. Simpson was not required to prove actual disadvantages inhering in the alternative to the price-fixing; and the maintenance of his suit was not preconditioned on his having attempted those alternatives and suffered actual loss. There is no reason why CBS should be placed in any worse position.

Moreover, once the evidence of the disadvantages patently inherent in a bypass attempt are considered against the "likely disadvantage" test (as they never were by the courts below), it is not only apparent that this record amply meets such a standard, but also perfectly obvious why the networks need not give prolonged consideration to attempting any such putative alternative.

B. Injury in Fact Threatened CBS by Any "Viable" Alternative to Acceptance of the ASCAP Fixed Price, and the Errors of Law Committed by the Courts Below in Reviewing that Evidence.

We wish to re-emphasize that the present barriers to direct licensing are artificial, cartel-created, and quite removable by decree (*See* pp. 31-35, *supra* and Point IX below). Thus, we agree with the district court findings, approved by the court of appeals, that there is no inherent reason why this market cannot function perfectly well on a direct-licensing basis (*see* Pet. App. 10a).

Our point is that the present barriers, unremoved by decree, are sufficient in law to meet any test of "coercive" price fixing (assuming *arguendo* such a rule were to be newly defined), any test of leverage (relevant to the tying offense) and any test of cartel power (pertinent to a showing of monopolization).* Hence, our dispute with the district court's findings concerns, not so much the court's conclusion that such present barriers are not insurmountable, but the materiality in law of that determination.

1. Direct Admissions of the Impracticability of a Bypass.

The most striking evidence regarding the so-called bypass possibility consists of defendants' outright admissions that such an approach is now impractical (admissions which go further than the legal standard discussed

*The latter two will be discussed in Points V and VI of this brief.

immediately above would require) as well as their concessions of the elements of injury inherent in such an attempt.

Those admissions are in the form of defendants' pleadings, briefs, affidavits and offers of proof submitted in this case and various consent decree proceedings; the testimony given on deposition and trial of the man who for 40 years was the dominant force in the ASCAP organization, Mr. Finkelstein (and whose judgment that a network bypass was now "wholly impractical" was reiterated in many different ways throughout the transcript); and, most conclusive of all, stipulations of fact entered into by the parties.

Some of the concessions regarding subsidiary points of fact are covered below. To review all of defendants' conclusory admissions regarding the impracticability of a bypass would greatly enlarge this already lengthy brief, and they are therefore outlined in Addendum D.

Apart from the district court's brief discussions of the stipulations, the opinion below did not deal with any of these admissions; yet they were dispositive of even the issues erroneously framed by the court's application of inapplicable legal standards.

2. The Need to Ask ASCAP Members to Disband Their Own Combination Voluntarily, Systematically and at Appreciable Personal Effort and Expense in Order to Create the Facilities for a Competitive Market That They Concededly Fear and Abhor.

The bypass-injury point to be made here is established by the district court's findings themselves and by uncontroverted proof as to which no findings are in disagreement.

1. The district court found that there do not presently exist adequate marketing facilities, institutional or otherwise, for the direct licensing of published music to television networks (Pet. App. 61a, 66a). Indeed, the parties stipulated that publishers do not even have the "facilities or procedures for processing such requests" (E 6 (para. 16)).

2. The facilities necessary to a successful network bypass of ASCAP cannot be created by CBS (or any network); they must be created by each of the many music publishing corporations at appreciable personal effort and expense, and with considerable cooperation from writers (who, under AGAC and similar contracts, must give their consent to licensing networks outside of the cartel) (Pet. App. 72a; E 433 (para's 4(j-k)); Chiantia D 266-69; Coleman D 339-44; Morris D 663). Moreover, most of the things that would have to be done by publishers would not even be visible outside of their organizations (*see* note at 29-30, *supra*). And to make direct licensing work, they would have to be done with the same dedication and attention to detail that businessmen normally devote to a project that they affirmatively want to succeed.

3. Even apart from a natural desire to avoid spending their own funds for the creation of direct-licensing facilities, music publishing corporations have compelling economic incentives to preserve the ASCAP system and, therefore, to see a bypass attempt fail. And, whether emanating simply from such self-interest or from a sort of fraternal zeal, they regard threats to that system with heated emotional fervor. [Addenda A-C]

The district court found that the ASCAP "writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket-licensing system" (Pet. App. 83a), "that the cited testimony proves" that they "are apprehensive of dealing directly with CBS" (Pet. App. 84a), and that "the feelings of some

writers run high when talk of direct licensing is in the air" (Pet. App. 101a-02a). Though adequate for our purposes, it should be noted (as is shown in Addenda A-C) that those findings rather substantially understate the attitudinal evidence in this case. In point of fact, the noted "preference" for the status quo is an intense and deeply ingrained desire to preserve it and the noted "apprehension" of direct dealing, nothing short of unbridled aversion.

The question posed, therefore, is whether the combination of those three undisputed facts confront the network with threats of disadvantage (*i.e.*, barriers cognizable in law) were it to abandon its ASCAP license and strike out on its own. Or, as it might alternatively be stated in testing whether such barriers would "work": whether a reasonably prudent manager of such a business would regard as acceptable the risk that publishers would refrain (as Stanley Adams put it, in referring to CBS's per-use request) from "burning down" their own "house" (Adams D 7-8)—by (we might add) simply forebearing from tossing their own money on the fire.

We believe it obvious that he would not. None ever has, despite the fact, freely conceded by defendants, that prices would be lower in a competitive market (E 448, 831; JA 45-61; Vogel Tr. 1915; Green Tr. 3474; Nathan Tr. 3909; Brettler D 179-82, 190-92; Fagan D 498-501; Morris D 681-82, 719-20, 752-53; Washington D 947). Such a course is sensibly regarded, by ASCAP as well as CBS, not merely as disadvantageous, but as economically suicidal (E 808; Sipes Tr. 80-86; Wright Tr. 462-75; Vincent Tr. 633-47; Sunga Tr. 758-59; Fisher Tr. 1684-90; Segelstein Tr. 2024-32; Finkelstein Tr. 3717-18; Finkelstein D 575-82).

a. The district court's compartmentalized view of the evidence, failing to connect in any meaningful way publishers' and writers' aversion to direct licensing and their creation of direct-licensing facilities.

When viewing the transactional and mechanical problems of a bypass given the present lack of direct-licensing facilities, the district court focused solely on the physical possibility that such problems could be overcome (Pet. App. 61a-79a) and on the purported legal question of "whether the lack of 'machinery' " itself constitutes an "illegal restraint of trade" (Pet. App. 61a). Not surprisingly, the court found that it was physically possible to overcome those difficulties and that their mere existence was not unlawful.

Similarly, when viewing the evidence of antagonism and resistance to direct licensing, the district court focused entirely on whether such evidence proved that ASCAP members would "boycott" CBS or whether they "would deal" (Pet. App. 79a-108a).* Not surprisingly, the court could not find the certainty of a boycott in evidence of aversion to direct dealing or even in past incidents of refusals to deal.

The only time the district court opinion attempts to connect (a) the need for direct-licensing facilities with (b) the publishers' and writers' intense antipathy to their creation, is in the purported syllogism that ASCAP publishers would "*logically* create an efficient mechanism to facilitate" the direct licensing of CBS *since* they would be "willing to deal with CBS producers" (Pet. App. 78a) (emphasis added).

Plainly, that statement is not logical at all. It must be apparent that there is a substantial difference between publishers' "willingness to deal" (begrudgingly, regretfully and "*ex necessitate*," as the court elsewhere states

*The district court even thought that it was CBS who had tendered such an issue, although it had plainly not. For it to have done so would have been consistent with the court's legal theory of the case, and indeed several CBS witnesses expressed the concern that major music publishing corporations would refuse to deal, as they had with 3M. Defendants were quick to assert that such testimony meant that CBS had conceded that "refusal to deal" was the determinative issue—and while the court was apparently misled, such testimony was hardly a concession by counsel or the tendering of any issue.

(Pet. App. 90a)), if approached by CBS, and the readiness to spend their own money and exert their own efforts to create the facilities for a system they abhor in order to destroy one they venerate. Nowhere does the district court's opinion recognize that difference.*

b. The district court's findings with respect to the physical possibility of creating direct-licensing facilities.

As to the mechanical problems of direct licensing, the district court found that it was physically possible for the Harry Fox Agency to perform the same job in television network performance music rights that it now does with respect to other music rights transactions (Pet. App. 72a-73a). It was necessary to the internal logic of the opinion to reach that view for the court had earlier found that

> "we agree that direct licensing on any major scale would require some central clearing machinery through which transactions could be brokered." Pet. App. 72a.

*The district court did find that music publishing corporations' desire for network "exposure" of their music would fortify their "willingness to deal"—but, again, no publisher expressing that desire testified that he would spend his own money for the creation of direct-licensing facilities, in preference to deferring such expenditure (and watching other publishers do the same) until CBS returned to the ASCAP fold, and all received the normal "exposure."

The fact is that, if publishers were actually anxious to compete on price for network exposure, they would have done so long prior to this by removing both ASCAP and BMI from the network markets.

The court of appeals expressed the view that CBS could "require" the packagers to obtain the necessary performance rights for their programs (Pet. App. 9a)—but the obstacle here in question is one that confronts any producer of a television program, be it an independent packager or the network itself. In other words, CBS could "require" all it wants, but that would not create direct-licensing facilities in each of the many music publishing corporations which would prefer not having any such facilities.

The court of appeals also appeared to believe that the machinery set up for the licensing of television synchronization rights might be presently adequate for the licensing of performance rights, for it stated that the packager could be required to obtain the latter when obtaining the former (*ibid.*). *But see* note at 20-21, *supra*, and the discussion in the text immediately below.

Such a physical possibility, however, is wholly beside the point. All Fox does is to broker transactions—*i.e.*, receive producer requests for licenses and call publishers for their response (Berman Tr. 775; Mingle Tr. 858-60). Thus, even enlarging the Fox Agency to the size required to broker television performance rights transactions in addition to its other jobs would still not save any publisher from having to perform itself virtually all the affirmative steps involved or, of course, any part of the expenses of those tasks. They would still have to communicate with their writers, obtain writer consents, negotiate the terms on which such consents would be granted, amend existing contracts with writers, add or train personnel within their own staffs to relate to the Fox office, develop forms, and keep abreast of market trends and patterns (*see* note at 29-30, *supra*).

The court also assumed that the publishers would want Fox to undertake the brokering of CBS transactions because they had Fox undertake the brokering of movie rights transactions commencing in the mid-1950's; and that they could obtain writer consents for CBS transactions as readily as they obtained them for both movie rights and synchronization rights transactions (Pet. App. 70a-72a). Overlooked in these assumptions are the facts that Fox was not brought into the licensing of movie rights transactions until *after* ASCAP had withdrawn from that field (as a result of the decision in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions) and the 1950 decree), so that the publishers literally had no other choice (Berman Tr. 824-25); and that ASCAP has never entered the synchronization rights market (Berman Tr. 826-27). Furthermore, there is again direct testimony on the very point, in which Mr. Morris, after reciting the reactions of writers in the Warner Brothers incident,* related that experience to their pre-

*After more than three decades, publishers still vividly recall that Warner Brothers' attempt at direct licensing led to the exodus from its catalogs of some of the "foremost names in the music world," the "alienation of the writers" and "their completely antagonistic" and "rather violent" reactions (Morris D 646-49, 731).

dictable reaction to any development of Fox for the licensing of networks while ASCAP remained in the field:

> "ASCAP is a product of, I would say, mainly in the beginning, writers, and a few publishers. That was their child. . . .
>
> "Fox is a clearing house. There isn't any way to compare it. I am not being critical of the function of that, but I know that this would be a very complicated and very difficult and in some cases almost violent on the part of writers as how they feel.
>
> "Q. Of course, ASCAP used to license motion picture producers before the 1950 decree. It was only after that decree that Fox got into this?
>
> "A. Yes.
>
> "Q. And the writers have been content with that, haven't they?
>
> "A. . . . You say the writer is satisfied. Once the right was denied ASCAP, this I would say was a compromise of publisher and writer as an expedient way of doing business. . . ." (D 741-43)

Moreover, Mr. Brettler, who is in a position to know (he is a director of Fox, the NMPA and ASCAP), summarily rejected that possibility:

> "Q. Suppose the whole thing were given to Harry Fox to do? In other words, Harry Fox was now designated by the music publishers as an agency which would operate in the same fashion with respect to the licensing of performance rights for television network use as it now operates in connection with the licensing of performance and synch rights for theatrical motion picture use.
>
> "A. Wearing my other hat as a director of NMPA with said board and with having to pass on something like this, I would have to say 'Thank you very much, the Harry Fox Agency has all it can do in its present structure and form to negotiate and handle mechanical licensing.' " (D 192-93)

c. The district court's findings with respect to CBS's supposed "fault" for the lack of direct-licensing facilities, the time required to create them, and the acquisition of "mini" licenses.

Significantly, the district court did find that CBS could not overcome the present lack of facilities, publisher and writer antipathy to direct licensing and the problem of "music-in-the-can" (discussed in the next section of this brief) without working for that result over a substantial period of time (Pet. App. 65a-66a, 112a-13a). "Indeed," the court found,

> "there is no support in the record for the proposition that CBS could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation." Pet. App. 65a.

And the court later indicated that that period would be at least six to eighteen months (Pet. App. 108a).

Even assuming *arguendo* the relevance of buyer-alternatives to price-fixing, that finding is determinative of this action. The Sherman Act does not excuse price-fixing because a self-help alternative can be availed of by buyers with a sufficient effort over a long enough period of time. Every day in which sellers engage in such a practice is a day for which treble damages are recoverable (*see Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 262-65 (1946)), and thus the practice is enjoinable in advance.

The district court found that the absence of facilities which deferred the cessation of the practice was more CBS's fault than that of ASCAP members since CBS had never asked them to create facilities (Pet. App. 62a-63a). We need not stop to debate that proposition (beyond

noting its refutation by the points made earlier in this section) because "fault" in this context is an irrelevant concept. The facts are that the obstacle exists; that the continued presence of ASCAP in the field provides compelling incentives against its removal; and thus any attempt by a user unilaterally to overcome it threatens considerable disadvantage and loss. Consequently, whether ASCAP created the obstacle or stands in safety behind it, the result is the same: the price-fix remains intact.

Defendants lay great stress on the district court's statement (Pet. App. 85a) that music publishing corporations "would line up at CBS' door if it announced plans to drop its blanket licenses" (ASCAP Br. 2, 22, 26; BMI Br. 28), but that remark was obvious hyperbole, contradicted by findings which are not. For the court found "that direct licensing on any major scale would require some central clearing machinery through which transactions could be brokered" (Pet. App. 72a), and there would be no need for such machinery in order to deal with publishers lined up at one's door. Equally, there would be no need for that "long period of advance preparation" (Pet. App. 65a), if the mere announcement of an intention to bypass would produce such a line-up.

Thus, to imbue that statement with meaning one would have to interpret it as merely concluding that the publishers could ultimately be made to create the necessary facilities, which is to say that the barrier of a present lack of such facilities could ultimately be overcome. No doubt—if CBS were willing to spend enough money to buy them out of their combination.

In fact, that is exactly how the district court found CBS would "realistically" hurdle this barrier. The court recognized that if CBS tried to change quickly to direct licensing "there might well be problems" of the kind it

predicts (Pet. App. 65a). Thus, the court suggested that CBS obtain "mini-blanket" licenses from publishers that would take effect at some target date in the future (*e.g.*, one year hence) and cancel its ASCAP license only after it had accumulated a sufficiently "large reservoir of music" by such means (Pet. App. 113a).

To obtain rights to use a catalog at some future time is, of course, to obtain an option on that catalog. And if there is one fact on which the economists for CBS and ASCAP were in complete agreement it was that CBS would have to pay—and pay dearly— for the purchase of any such options (Fisher Tr. 1700-08; Fagan D 428-29, 524).*

Quite obviously, the prices paid by CBS for any such options would be money down the drain in the event that a sufficiently "large reservoir" were not ultimately amassed by this method—a risk factor of no small proportions. But what would be purchased, in effect, by such payments in the event sufficient "mini-" licenses were obtained?

Certainly not the sort of competitive market which now exists in the licensing of movie rights and mechanical rights, or which would exist in the licensing of television performance rights if similar facilities were created. Producers of motion pictures or films are not forced to make such incremental option payments in order to gain access to publishers' catalogs. On the contrary, as each such producer finds the need for a particular type of composition, he solicits bids from the publishers of those songs and they compete against each other on a price and quality basis (Mingle Tr. 858-60, 868, 877-79; *see also* Berman Tr. 829-31).

*Mr. Morris testified that his price of selling such an option to CBS (not even counting the subsequent usage payments) "would have to be in terms so I would never have to worry again of any problems" (D 732-33).

Moreover, even assuming sufficient options could be purchased at prices that were not entirely prohibitive, that CBS cancelled its ASCAP license at that time, and then utilized music in the optioned catalogs for the terms of these mini-per-use or mini-blanket licenses, one year prior to the end of those terms, CBS would have to repurchase options for subsequent terms—*i.e.*, repeat the process and reassume the risks all over again. And still there would be no reason to expect the development of the sort of facilities which would enable the direct licensing of each use as its need became known in the production process.

In sum, while the facts found by the district court establish threat of disadvantage to any extent legally material, the conclusions reached by the district court, governed by erroneous legal standards, are entirely superfluous to the case.

3. Premiums That Would Have to Be Paid Over Competitive Market Prices to Directly License Music Recorded in the Sound Tracks of Existing Programs and Theatrical Films ("Music-in-the-Can").

The additional injury threatened any bypassing network by having to license thousands of musical compositions already recorded in its inventory of programs and films and in those (from the world's present stock of films) it will subsequently seek to obtain rights to telecast is discussed briefly in the statement of facts (*see* pp. 31-33, *supra*).

Much of that music is owned by "outside" publishers (those not affiliated with the companies that produced the programs or films) and written by AGAC members or others whose contracts with publishers preclude direct licensing without the writers' consent (Pet. App. 70a; E 433 (para. 4(k)); PX's 461, 994; Chiantia Tr. 2979). The music owned by "inside" publishers (those who are so

affiliated) is generally subject to the same writer-consent limitation on direct licenses—either through AGAC or AGAC-type contracts (in the case of published music) (Pet. App. 70a; E 433 (para. 4(k)); Chiantia Tr. 2979) or CLGA collective bargaining agreements (in the case of music written for the program or film) (E 1540 (art. 13(c)); Green Tr. 3446, 3451-52).

While the premiums that publishers and writers could command over competitive price would doubtless vary from extreme demands to the more modest, overall, randomized over thousands of transactions, some significant portion of the price would be attributable, not to competitive market values, but to the fact that the music was in-the-can.

The point is economically axiomatic. It was readily conceded by ASCAP's own economic expert, Mr. Nathan (Tr. 3903, 4052), and was confirmed by Professor Fisher (Tr. 1686-87, 4805-08). BMI maintained in its trial memorandum that the music-in-the-can situation would give the copyright proprietor "the power to name his price"; would "result in occasions on which CBS will be unable to use finished material without paying very large sums for performance rights"; and would pose a situation which "CBS would find . . . intolerable" (JA 354; Cramer Tr. 4717-18).*

Of course there is uncertainty about how high these premiums would go. The very magnitude of that uncertainty is one of the most compelling business factors militating against an acceptance of a situation of this nature. It is absurd to believe that rational businessmen will simply convey leverage of these dimensions to persons with whom they must deal and subject their companies to this sort of problem (Fisher Tr. 4808).

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*While that statement was made by BMI with respect to music placed in-the-can prior to the exercise of the withdrawal right contemplated by the per-use system (as part of a BMI argument that the system was unworkable), it obviously applies with equal force to a straight music-in-the-can situation.

The Department acknowledges that a television network could not attempt to bypass until, with respect to its current inventory of films, it "had concluded an agreement with every owner of copyrighted music 'in-the-can' to allow future performances for an identified price" (Br. 25), for otherwise it could not determine whether premiums payable on music-in-the-can would exceed the savings obtainable by licensing other uses in a competitive market.* But the Department inexplicably overlooks the fact that, until a competitive market is created, there will be no competitive market prices,**and thus no way to measure the extent of the premiums (over such prices) that music-in-the-can will command.

Moreover, while the fact of such premiums is conceded, the Department fails to explain why a network should be forced to pay them as a penalty for gaining access to a competitive market; why, indeed, such access should be delayed for the time necessary to conclude agreements for more than 13,000 compositions recorded in the network's present inventory (PX 994); or how the network would solve the music-in-the-can problem with respect to all other existing films and programs on which it will have to bid to meet its future programming requirements.

The district court also recognized the music-in-the-can problem (at least as to the existing CBS inventory) but not its relationship to this lawsuit. Recall, the court's sole focus on the evidence regarding bypass disadvantage

*Actually the way the Department states the point is: "whether that price was sufficiently low that termination of the blanket license would be profitable" (Br. 25)—but the meaning is the same.

**While the court-set per-use prices would initially confront the same disability, they can be periodically adjusted to reflect competitive prices (evidenced in direct licensing transactions for non-music-in-the-can uses); indeed, the court could defer setting rates for music-in-the-can uses until after such evidence of direct-licensing prices had developed.

(apart from its inquiries concerning physical impossibility) was whether such evidence demonstrated the certainty of a boycott. The court was willing to deem a certainty that copyright proprietors would concertedly "hold-up" CBS on music-in-the-can as the practical equivalent of a boycott (Pet. App. 102a-03a)—but anything less than such inevitably concerted "hold-ups" was considered irrelevant. As to proof short of such certainty, the court said:

> "evidence of the ease or difficulty with which the antitrust laws may be violated cannot be equated to proof that the violation will occur." Pet. App. 103a.

As to evidence falling short of "concerted" demands for "hold-ups", the court held,

> "simple greed, independently expressed, does not constitute a restraint of trade." Pet. App. 104a.*

The issue, of course, is not whether "simple greed," the certainty of "hold-ups," or even the more relevant potential for premiums constitutes in and of itself a restraint of trade. And the issue surely is not whether "hold-ups" or premiums would be "independently expressed" or concerted. The restraint of trade in this case is the ASCAP price-fix. Thus, the pertinent issue, if any (*i.e.*, if buyer-alternatives to a price-fix are relevant at all), is whether an alternative that entails the loss promised by the music-in-the-can problem somehow eliminates that restraint.

Of course it does not. The court's failure to reach that conclusion was attributable, not to its findings of fact, but

*As the Department notes, the district court

> "did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS's dropping the blanket license sufficiently high . . ." (Br. 25 n.23)

and

> "the prospect of such negotiations offers the copyright owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing . . ." (Br. 25).

to the application of an erroneous legal standard which makes those findings irrelevant.* In a number of respects they are also clearly inaccurate, but we believe that to be evident from what has been said above, and, in view of the length of this brief, they will not be separately treated.

C. Burden of Proof.

The district court held that it was CBS's burden to prove the "non-viability" of the bypass alternative in order to establish that defendants' price-fixing was a restraint of trade (Pet. App. 44a-47a). The irrelevancy of the bypass alternative in law (Point I) and its inutility in fact (Point III. B.) should render the question of burden of proof academic.

Nevertheless, if buyer-alternatives to a price-fix were relevant to a determination of whether price-fixing were a restraint, it would clearly be the defendants' burden to establish that buyers could avail themselves of such alternatives without competitive disadvantage or other loss. *See TV Signal Co. of Aberdeen* v. *American Telephone & Telegraph Co.*, 462 F. 2d 1256 (8th Cir. 1972); *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 415 F. 2d 55, 62 (4th Cir. 1969), *cert. denied*, 397 U. S. 920 (1970); *Bergen Drug Co., Inc.* v. *Parke, Davis & Co.*, 307 F. 2d 725, 728 (3rd Cir. 1962); *Allied Electric Supply Co.* v. *Motorola, Inc.*, 369 F. Supp. 133 (W. D. Pa. 1973).

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*The court of appeals nowhere expressly approved the district court's findings on the music-in-the-can subject. The court of appeals noted that

> "This is a question of fact and the District Court found that 'CBS has not proven that its fears of a 'holdup' by copyright proprietors are justified'." Pet. App. 10a-11a n. 14.

But rather than holding that that finding was not "clearly erroneous" as it had as to other findings, the court of appeals then stated

> "In any event, it is hard to see how 'music in the can' problems will be solved by an injunction against blanket licensing. The individual licenses would still have to be negotiated with some of the same economic problems involved." *Ibid.*

The answer to that implicit inquiry is: (a) the *Alden-Rochelle* solution of forfeiture, (b) a limited per-use licensing method applicable only to music-in-the-can, or (c) a full per-use system (*see* Point IX below).

The district court attempted to distinguish *TV Signal, supra*, on the ground that the restraint in that case (a boycott) was apparent irrespective of buyer-alternatives, but in this case, nonexistent unless buyer-alternatives were proven to be not "viable" (Pet. App. 44a-45a). Since there is no more reason to conclude that a price-fix is vitiated by an alternative means of buying the product than there is for believing a boycott relieved by the availability of substitute products, that ruling by the district court was erroneous.

In terms of antitrust policy, it is difficult to imagine a rule more discouraging of the institution of private claims against price-fixing *or* boycotting than one compelling the plaintiff to assume the burden of demonstrating the inutility of every alternative with which he was allegedly presented to avoid yielding to the defendants' restrictive terms.

POINT IV

EVEN ASSUMING, CONTRARY TO LAW, THAT PRICE-FIXING BY MUSIC PUBLISHING CORPORATIONS WERE GOVERNED BY THE RULE OF REASON, THE UNREASONABLENESS OF THE RESTRAINTS IMPOSED HERE ARE SUFFICIENTLY SELF-EVIDENT ON THE FACE OF THE FINDINGS AND UNDISPUTED PROOF AS TO WARRANT AN AFFIRMANCE ON THAT GROUND.

The rule of reason implies the application of a balancing process—the result of which here is readily seen.

On the one hand, the operation of these cartels, in the market for licensing music for network use, achieves nothing—*absolutely nothing of cognizable economic value*—that cannot be achieved in a competitive market (*see* Point II. above). It is not necessary for market-functioning purposes—that is a conceded and a found fact. It does not even achieve the sort of transactional efficiencies for which cartelization is sometimes heralded. And it is not the least restrictive alternative, but the most restrictive—direct licensing or a per-use system would be patently less restrictive. ASCAP's own economic expert,

Mr. Nathan, in contrasting blanket licensing (coupled with consent decree rate-making) to price competition in "performance rights as licensed to television networks" declared that the latter would be "healthy economics," would "benefit . . . the arts and sciences" (Nathan Tr. 3986-87) and, further,

> "Q. Just to conclude this section, you believe that the substitution of Governmental price-fixing for a competitive market vis-a-vis mechanical rights [the statutory ceiling] or the licensing of performance rights to television networks [consent decree rate-making] is incompatible with our basic economic concepts in that it substitutes Government fiat for what should be private enterprise bargaining and decision-making, it does so in a sector which certainly does not fall within the national security or public utility categories and it is a flagrant incursion of arbitrary price-fixing where there is no demonstrable need?
>
> "A. Yes, sir. Those are my words." (Nathan Tr. 3987-88)

And, as Mr. Nathan then elaborated:

> "[T]o the extent that it is practicable for people to negotiate, for people to exercise choices, for the buyers and the sellers to determine the transaction arrangements between them, to that extent I think it is preferable than to have determination by Government of the prices and of the bargaining arrangements.
>
> "I think it is preferable from a wide range point of view of resource use, efficiency, economy, choice, freedom of opportunity, rewards and every other—of many considerations in our system that we regard as very cherished and very desirable and very valuable." (Nathan Tr. 3988-89)

In short, on the side of the scales one might look for counterbalances to anticompetitive restraints, there is nothing but a vacuum (which is ominous in itself).

On the other side, the purposes and effects proscribed

by the rule of reason are here manifest and many. We have just discussed in Point III the barriers to a direct licensing market that inherently arise from this sort of cartelization. In Point I we reviewed the various impacts this system would have on direct-licensing prices even under the unrealistic assumption that any network would be willing to incur the obvious penalties of making a bypass attempt. In Point II we described the waste (transactional *in*efficiencies) this system entails. And in this Point IV we will discuss the price-inflationary effects it has actually had, defendants' expressed intention to achieve them and the misallocation of resources it occasions.

A. Defendants' Intention to Eliminate Competition and to Inflate Price, and Their Success in Achieving Both Purposes.

It is, of course, the basic premise of the antitrust laws that competitive markets yield lower price levels than collusion. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958). That collusion here has actually had that anticipated effect cannot be subject to serious dispute.

It is patently ASCAP's objective, as its own economic expert, Mr. Nathan, explained, to charge the highest prices "the market will bear". (As Mr. Nathan further explained, "if they charged less, then I think their membership ought to change the management" (Tr. 3985)). In its power to do so, it is restrained only by the possibility of consent decree rate-making litigation; but it necessarily recognizes that users are themselves limited in their resort to such an alternative by the enormous costs and uncertainties involved (*see* Nathan Tr. 3984)—and, indeed, there has never been such a proceeding. The result is that the fee ASCAP initially charged networks in 1949 (prior to the consent decree's provision of judicial rate-making proceedings) has consistently spiraled upward thereafter with no relationship to competitive equilibrium price levels and with no prospect (before this suit) of abatement (E 5 (para. 10)).

There is no question, moreover, that the music publishing corporations themselves believe that the profits they make in the present noncompetitive system widely outdistance those obtainable by price competition (Pet. App. 83a-85a; Addenda A-C). Businessmen are the best judges of their own self-interest; and these businessmen have left no doubt—by their testimony in this case; indeed, by their very opposition to it*—that they would fight any change to the hilt.

Addenda A-C are replete with examples of publisher and writer admissions of their extreme antagonism toward price competition and acute awareness that ASCAP's role is to insulate them from that problem. For example, price competition to Mr. Brettler would be "self-annihilation" (D 237); to Mr. Morris, "the end of the road for me as a publisher" (D 662); to Mr. Brackman, an opportunity to "wind up getting less than you started out with" (D 110); and to Mr. Vogel, "the price of music would go down" (D 933-34).

That their cartels are designed to preclude such results was no less candidly conceded—*e.g.*, "as individuals we have no strength" and "it's important as a publisher to combine with other publishers" (Mr. Goodman, Tr. 1631-32); "in unity there is strength and in disunity there is weakness" (Mr. Brettler, D 201); "ASCAP has a superior bargaining position than any one or group of its publishers" (Mr. Morris, D 720); and the "umbrella" speech rendered by ASCAP's president, Mr. Adams, (E 449), which, in addition to admonishing that "there can be nothing as important as presenting a solid front across the negotiating table" (E 454) and that "little deal[s] on

*Music publishers could have terminated this case at any time by agreeing to remove their cartel apparatus from the marketplace. In fact, they could have prevented the commencement of the suit in December 1969 by agreeing to negotiate the terms of a per-use license. However, as ASCAP's President, Stanley Adams, testified, the relief CBS sought was regarded by the ASCAP board as "a match to [our] house" and no serious consideration was given to anything other than getting "a hose to put out the fire" (D 7).

the side" make "hole[s] in the fabric of the umbrella," (E 455) articulated the cartel's purpose concisely:

> "To resist the splitting of our ranks so that we can be picked off one by one." (E 450)*

Even ASCAP's economic expert witness, Mr. Nathan, was constrained to agree, on questioning by the court:

> "THE COURT: . . . Don't you think it is reasonable to assume that the writer does believe that it is an advantage to be a member of ASCAP because he doesn't have to compete for the price?
>
> "THE WITNESS: I suspect, your Honor, that is true. . . ." (Tr. 3909)

But these admissions are not confined to the testimony of important ASCAP publishers, board members and executives. The organization has itself conceded anticompetitive purpose and effect in equally vivid and explicit terms. Thus, on NBC's application for a "nucleus" license to 2200 compositions (see discussion of those proceedings at 16-18 above), ASCAP's general counsel, Herman Finkelstein, submitted a series of affidavits, which, stripped of pejoratives and slogans, are saying nothing less than (1) direct licensing would cause a substantial reduction in present prices; (2) ASCAP's function is to foreclose such competition; (3) the purpose of the rate-making procedures of the consent decree is not to protect the public interest in achieving competitive prices, but to assist ASCAP in achieving exactly the reverse (*e.g.*, E 390, 405).

In fact, the basic thesis of ASCAP's counterclaim in this case (where ASCAP alleges that CBS and NBC, through their respective antitrust and consent decree proceedings, have attempted to "depress the price each pays for performance rights of musical compositions") (JA 56) is that prices would be lower if the music publishing corporations were forced to compete on price. To be sure, ASCAP attributes the prospective reduction in prices to

*We urge that all these quotations be read in full context, for they underscore these points even more dramatically when they are.

"network buying power"—but that is simply a pejorative description of one element of competitive market dynamics (others being, for example, the bargaining position of the seller and supply and demand).*

But perhaps the clearest manifestation of defendants' anticompetitive intent is provided by their refusal to grant the less restrictive alternative (a per-use system, which would permit direct dealing, and thus some semblance of price competition, immediately to occur) and to insist instead on a continuation of the blanket system (which totally eliminates any such competition).**

Indeed, the evidence of anticompetitive intent is so plain in this case that, if there were any reason otherwise to doubt the application of the *per se* rule, such evidence of intent would itself be sufficient to bring the case within that ban. *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2869, 2878 (1978); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26n. 59 (1940).

The Department suggests that arguments (sufficient unto the rule of reason) of anticompetitive purposes and effects may not have been made to the court of appeals.

*Although discussed more fully in the concluding section of this Point, and while actually irrelevant in law, there is no basis whatever for believing that music publishing corporations would not profit as well or better in this market competing on price in performance rights than they now profit in competing on price in purveying the same rights to movie companies or, indeed, mechanical rights to phonograph record companies where they are restricted in the prices they can obtain by a statutory ceiling.

**Particularly is that so in view of the fact that any difference in expense between administering a per-use or blanket system would be *de minimis*. Uncontested evidence at trial showed that the start-up cost of a per-use system for ASCAP would be $9,500; for BMI $22,000; and for both, continuing incremental costs of a few hundred dollars a calendar quarter (Kaplan Tr. 2280-92). The reason is obvious: since ASCAP and BMI have computer capability to distribute revenues on a per-use basis to their members, the extra computer programming required to convert per-use distribution statements into per-use bills would be trivial.

Not only is that untrue,* but we believe it fair to conclude that the court of appeals effectively reached a determination of unreasonableness as an alternative holding in this case.

Certainly the court's conclusion that blanket licensing "dulls" defendants' "incentive to compete" (Pet. App. 20a) and "provides a disinclination to compete" (Pet App. 22a) were determinations of anticompetitive effect. Likewise, there is implicit in its proposal that ASCAP be "required to provide some form of per-use licensing which will ensure competition" (*ibid.*) a recognition that ASCAP's prior refusal to do so had precluded precisely that result. Moreover, while the court of appeals held that this system was illegal *per se*, it nevertheless looked at a possible market-functioning defense, which means that it conducted a rule-of-reason analysis and found reasonableness wanting. In other words, one should not be misled by the labels attached to the analytical steps—*i.e.*, whether called a "necessity" exception to the *per se* rule, or a rule-of-reason inquiry limited to "necessity", the result is the same. And it fulfilled at least the one logical part of that process of analysis which the Department now urges should be performed.

B. Misallocation Effects.

Another economic objective served by price competition, as important as the paring of price, is efficient resource allocation. That goal is achieved when the resources of a society are utilized in such a manner that productive output matches consumer demand, both in terms of the types of products produced and the quantities and qualities in which they are produced. [Fisher Tr. 1648-50; Nathan Tr. 3990-92]

*In our brief of February 13, 1976, to the court of appeals we argued in Point I.D. and F. and Addenda A-C the same impacts on putative direct licensing prices as have been presented here; in Point II.B. and Addenda A-C and E of that brief, the same barriers to a bypass; in Point I.F. and Addenda A-C, dexendants' anticompetitive purpose; and in Point IV.B. the same price inflationary effects.

In analyzing the role played in that process by price competition it is useful to analogize consumers' purchases to "votes," and the prices they are willing to pay to "weighted votes." By the registering of such weighted votes in the marketplace, buyers effectively inform sellers of what products they want and the qualities and quantities in which they want them. Sellers who respond effectively to those votes, in terms of quantities, qualities and price, prosper in the market. Those who do not will have business bid away from them by competing sellers, and resources will be allocated to where they are publicly desired. [Fisher Tr. 1682-83; Nathan Tr. 3992-93]

To delete the price factor from these "votes" by eliminating price competition distorts the resource allocation process for music in at least two ways.

The first concerns resource allocation as between music and non-music program elements (*e.g.*, actors, scripts, scenery, costumes, shooting on location instead of in a studio). Under the present system, after a network accepts and pays for a blanket license, each use of music, from the packagers' standpoint, is free-at-the-margin. That is obviously not true of other program elements as to which the producer must incur incremental costs. Hence, music suppliers are unduly encouraged, and non-music suppliers unduly discouraged (in the same sense that a copyright proprietor who had left ASCAP or BMI would be at a severe disadvantage in competing against the free-at-the-margin music available from those pools). [Fisher Tr. 1664-79, 1682-83; Nathan Tr. 4000, 4011-16, 4018-19, 4028]

That precisely such an effect is intended was made clear by ASCAP's Vice President and Board member, Mr. Chiantia (who is also President of MCA Music and of the NMPA):

> "THE COURT: What is it that makes you conclude even if only tentatively that, what are the factors in your mind when you say that your guess is that you would have less use of your music [in a direct licensing system]?
>
> "THE WITNESS: Well, under the present system your Honor, a producer of a program can use as much or as little music as he pleases, the price is the same. CBS pays a certain performance—a certain fee for the right to perform all of the music. If he suddenly became budget conscious, he might reduce the amount of compositions that he is going to use in his show." (Chiantia Tr. 2955)

The second distortive effect concerns the allocation of resources as between new music, originally created for television programs, and previously published music. Thus, it is virtually certain that the use of music written for television would increase in a competitive market in relation to the use of published music, for the use of the former is now substantial despite the fact that it bears a total incremental cost (in terms of salaries paid to the writers of such music) and is forced to compete against published compositions which are free-at-the-margin. [Nathan Tr. 4022; Fisher Tr. 1682-83, 4784-88; Wright Tr. 422-24; Vincent Tr. 599-601; Sunga Tr. 745-47]

The chief beneficiaries of that result are, of course, the old-line music publishing corporations (which now collect ASCAP distributions as if clipping the coupons of a bond). There is no more reason why such corporations should be favored over those composers who now seek to create new music for television use, than there is why any music supplier should be favored over the authors of scripts or the creators of costumes or scenery.

C. Defendants' and Amici's Arguments of Reasonableness.

Alternative verbalizations aside, the point that defendants are really making in this case—indeed, have been making since ASCAP's formation in 1914—is a point that alone would be determinative of a rule-of-reason analysis: cartelization is desirable to protect them ("individual

composers"—they rarely speak of music publishing corporations) against the bargaining power of large-scale users, such as CBS.

The facts are, that music publishing corporations, not writers, will deal on performance rights (as they now do in all other fields unoccupied by ASCAP and BMI); that most major music publishing corporations belong to conglomerate families as large or larger than CBS; and that CBS, because it produces few of its own programs, will rarely be dealing for performance rights at all (the packagers will, in the same manner they now negotiate with other suppliers for all other program elements). [Pet. App. 9a-10a n.13, E 10 (para.37)]

The closest available proof regarding the price levels of direct-licensing transactions comes from the movie rights field—and those prices are substantial (typically ranging from $750 to $20,000 per song) (Mingle Tr. 869-70). The movie companies that buy those rights have at least as much bargaining power as the television producers who will buy the performance rights for network television programs. In fact, they are in most cases the same companies.

Defendants also imply that there is something different about music which should alter the normal standards of *per se* or rule-of-reason analyses. This Court has repeatedly stated otherwise in respect of other creative products (*e.g. Associated Press* v. *United States*, 326 U.S. 1, 15 (1945); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941)); and did so explicitly with respect to music in *Watson* v. *Buck*, 313 U.S. 387 (1969).

The Department suggests that there be "an economic inquiry," into not only purposes and effect, but also "the percentage of the market affected" (Br. 9). Fine—the percentage here is virtually 100% (Pet. App. 27a).

In sum, there cannot be two sides to any rule-of-reason question in this case, even assuming, contrary to existing

law, that such an issue should be posed. ASCAP and BMI continue to operate in this country as if they were public utilities, each marketing at a single price vast quantities of otherwise competitive products and thus foreclosing the development of a competitive marketplace around the many suppliers of those products. That condition obtains despite the lack of any authorizing statute, despite the clear availability of feasible and more competitive alternatives, despite the fact, conceded by ASCAP's own economic expert, that the system has none of the natural characteristics of a public utility (Nathan Tr. 3880-81), and despite the further fact, also admitted by ASCAP's economist, that the creation of competitive conditions would far better serve the objectives of our economic system (Nathan Tr. 3970-72).

POINT V

DEFENDANTS ARE GUILTY OF TYING IN VIOLATION OF SECTION 1.

It is difficult to imagine a tying offense as massive and clear as that effectuated by ASCAP's (and BMI's) insistence on licensing solely on a blanket basis.

Had CBS called ASCAP or BMI on December 30, 1969 (the day before its then-current blanket license was to expire), and requested a license to the several compositions it could then identify for use on January programs, that blanket-only response would have effectively stated the standard all-or-nothing condition: take a blanket license to the entire pool or none whatever.

Such a response would plainly constitute "conditioning" within the meaning of this Court's tying decisions. And the leverage by which such "conditioning" would be enforced would consist (as discussed more fully in Point III.B., above) of the barriers to a bypass attempt.

What CBS actually requested of ASCAP and BMI in December 1969 was a per-use license (JA 31), which is functionally identical to at least the above-described request (plus, in fact, a continuing request for licenses to

separate uses as compositions are selected in the program production process). ASCAP's and BMI's rejection of that request and their insistence on issuing only the all-or-nothing blanket—then, and throughout the entire nine-year history of this case—thus equally amounts to "conditioning" and is enforced by the leverage of the penalties presently imposed on the direct-licensing alternative (plus, in BMI's case, the exclusivity of its licensing authority).

When the district court held in summary terms that CBS had "failed to establish" that it "negotiated with ASCAP or BMI to license only the 'wanted' compositions" or that those organizations had "refused to negotiate on that basis" (Pet. App. 116a), the court simply lost sight of those facts. Indeed, the court failed to recognize that the very complaint in this case was a demand on defendants to disengage that "conditioning," and defendants' nine-year opposition to this case, a refusal to do so.

The district court also held that CBS had "failed to establish" that

> "there were two separate and distinct 'products' (i.e., groups of compositions, of which CBS wanted to purchase only one) . . . ." *Ibid.*

But the plain fact is that the first copyrighted composition used on January 1, 1970, was a "distinct" tied product, since it was that composition that would have been separately licensed under per-use terms but which could not be, given defendants' take-a-blanket-or-nothing rejoinder.

The court of appeals affirmed the district court's ruling, not on either of the grounds stated above, but on the conclusion that "a [direct negotiation] market *can* exist" (Pet. App. 10a-11a). While the potential, future existence of such a market is indisputable, that prospect hardly dislodges the leverage ASCAP and BMI today wield to enforce the tie. The district court itself had found that such a market could *not* be made to exist without "a

long period of advance preparation" (Pet. App. 65a), which it later particularized to be approximately a year (Pet. App. 108a). Surely, the buyer-target of a tying scheme is not deprived of injunctive remedies to remove it, because he can overcome it himself through a year-long effort. When it is also conceded, as it has been on this record, that the network-target of this tie must also pay premiums over competitive price on tens of thousands of compositions in-the-can for the privilege of surmounting that "conditioning" (JA 354; Nathan Tr. 3903, 4052), any notion that such "leverage" evaporates because a competitive market potentially "*can* exist" is dispelled with finality.•

In *United States* v. *Loew's, Inc.*, 371 U.S. 38, 52-55 (1962), this Court recognized that the block-booking of films by a single distributor was not relieved by the distributor's offer of the same films individually, if the price differential between the packaged and unpackaged products had the "conditioning" effect. In other words, the mere availability of tied products on an alternative individual basis is not enough in itself to dissipate the tie.

It is exactly that principle which the court of appeals here failed to recognize in concluding that the future viability of a direct-licensing market vitiated the present

•The tying inflicted by the offer of a blanket license on a per-program method of payment is equally evident, even assuming, contrary to fact, that the per-program format were realistically available to a large-scale music user (*see* the court of appeals comment on that point at Pet. App. 7a n. 9; *see also* Finkelstein Tr. 3769-70).

The blanket offer confronts the user who seeks a separate license to any single ASCAP composition with the necessity to license all subsequent uses for the year from ASCAP (and, therefore, to do so at fixed prices). The per-program offer confronts the user who seeks a separate license to any single ASCAP composition with the necessity to accept (1) an ASCAP license to all other ASCAP compositions used on that program, and (2) what amounts to an ASCAP "floating lien" on all subsequent programs using any bar or strain of music in the ASCAP pool (since these programs, too, are then subject to the payment of the full per-program fee). It is enforced by the same barriers to direct licensing discussed above, plus several additional barriers created by the per-program format itself (*see* discussion of those in Addendum E).

imposition of the tie, irrespective of the present barriers obstructing such a market. And that ruling was clearly erroneous in law.

Indeed, as should now be apparent, it is the combination of price-fixing on the blanket license and the imposition of the tie that enables these cartels totally to eradicate price competition.

POINT VI

DEFENDANTS ARE GUILTY OF MONOPOLIZATION IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT.

A. Elements of Monopolization.

The offense of monopolization was held by this Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), to consist of

> ". . . two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

The classic test for defining markets under Section 2 was set forth in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956):

> "commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce' monopolization of which may be illegal."

And the test for determining whether such reasonable interchangeability among products exists is based on

> ". . . the responsiveness of the sales of one product [or service] to price changes of the other. If a slight decrease in the price of [defendant's product or service] causes a considerable number of customers of other [products or services] to switch to [defendant's product or service], it would be an indication that a high cross-elasticity of demand exists between them; that the products [or services] compete in the same market." *Id.* at 400.

Thus, in *Grinnell*, central-office property protection services (burglar and fire alarm systems) which were "accredited" by insurance companies, and hence enabled their subscribers to obtain lower insurance rates, were found *not* to be reasonably interchangeable with "non-accredited" services and, therefore, to comprise a separate market. Similarly, in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 426 (2d Cir. 1945), domestic aluminum was held to constitute a market separate and distinct from foreign aluminum or domestic copper and steel.

B. Defendants' Willful Acquisition of Monopoly Power.

If defendants possess monopoly power in their dealings with networks, their maintenance of it is certainly "willful," since it has been achieved by cartelization for which there is concededly no necessity and which, therefore, is not "thrust upon" them.

That the ASCAP and BMI combinations do in fact possess such power and are therefore guilty of monopolization we believe to be ineluctable conclusions on the record of this case.

Each, of course, is a common-sales agency. The performance rights comprising both agencies' pools would obviously be competitive and thus occupy the same market if sold individually; but they are not sold individually. The only thing sold by each agency is a blanket license to its entire pool; and the only way a network could avoid taking that license and attempt to obtain rights individually is by coming into collision with the barriers to a bypass discussed in Point III.B. above.

In the light of those barriers, "slight changes" in the price of an ASCAP blanket license will certainly not lead a television network to attempt a bypass (*i.e.*, in the language of the *du Pont* decision, "to switch to" individual

performance rights obtained on a direct-licensing basis). It is equally clear that "slight changes" in the price of an ASCAP blanket license will not induce a television network "to switch to" a BMI blanket license—the network indisputably needs both (JA 41-42 (para. 15), 68-69 (para. 15); E 6 (para.'s 13-15), 646; Fisher Tr. 1747-51; Nathan Tr. 4205-06; Adams D 27-28).

From the network-buyer's standpoint, therefore, ASCAP and BMI blanket licenses are not "reasonably interchangeable" with each other, nor is either "reasonably interchangeable" with direct licenses to the separate copyrights in the pool.* In consequence, defendant combinations have bifurcated what would otherwise be a single market consisting of individual performance rights into two separate markets, each consisting of a blanket license to approximately half those rights.**

Moreover, just as those markets are defined by the barriers between a blanket license and a bypass, the combinations' monopoly power in those markets is measured by the height of those barriers (*i.e.*, the degree of the

*BMI's exclusive rights, of course, preclude such interchangeability apart from the barriers that would exist in the absence of such exclusivity (JA 65 (para. 5); E 578 (para. III A), 583 (para. III A), 588 (para. 4(a))).

**Even if it were assumed, contrary to fact and law, that music performance rights constituted a single market, it would still be necessary to conclude that the market had been monopolized by the major music publishers. It is a stipulated fact that "virtually all major ASCAP publishers own or are owned by corporations which are affiliates of BMI" (E 6 (para. 17)). Mr. Cramer testified:

> "Most leading publishers have affiliation with both ASCAP and BMI. It is hard to think of one that doesn't have publishing interests in both camps." (Tr. 4282)

If the major book publishing companies in the United States combined and agreed to market their products through either of two common-sales agencies at prices fixed by those agencies (with the decision left to the author as to which of the two agencies would sell each book), they would clearly have monopolized the book publishing market. Precisely that result has been achieved by the major music publishing companies in this country.

disadvantages the networks would sustain by attempting to surmount them).

That analysis is certainly not unique to this case. A seller's monopoly power is always measured by the disadvantages to the buyer of attempting to bypass the monopolist—*i.e.*, by purchasing an alternative product or service or, in the case of a fungible product, by resorting to an alternative source of supply. As this Court stated in *Associated Press*, quoting with approval from Judge Learned Hand's district court opinion:

> "monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose." 326 U.S. at 17 n.17.

But the barriers involved here are far more substantial than those relied on in any prior monopolization case of which we are aware. They are certainly higher than those measured in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) by the delivery cost of importing aluminum from overseas; in *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952), by the cost of locating a business next door; or in *Associated Press* v. *United States*, 326 U.S. 1 (1945) by the competitive disadvantage of using UP and INS news rather than the AP service.

Thus, in this case, the barriers to a bypass *both* place the blanket license in a separate market from individual performance rights *and* confer monopoly power on each common-sales agency that purveys a blanket license.

The fundamental error made by the district court below in dealing with the monopolization issue was the following major premise of its market definition conclusion:

> "a bundle of direct licenses for network performances, acquired on an individual transaction basis, is interchangeable with a blanket license." Pet. App. 119a.

Only by ignoring the disadvantages the buyers would incur in attempting to substitute "licenses acquired on an individual transaction basis" for a blanket license could one conclude that the two were "interchangeable". But assessing the strength of precisely such disadvantages (measuring "the handicap" the combination "can impose," *Associated Press*, *supra*, 326 U.S. at 17 n. 17) is what Section 2 litigation is all about.•

The court of appeals made essentially the same error—which is also the error committed in its analysis of the tying offense. The fact that a direct licensing market "*can* exist" has little to do with the pertinent question as to whether the buyer must suffer handicaps and losses in order to make it exist.

The district court also held on the market definition issue:

> "ASCAP and BMI . . . are merely the sole source of the blanket licenses which CBS does not want. A market whose only product CBS does not want to purchase cannot by definition, be a relevant market . . . ." Pet. App. 118a.

•Indeed, if the barriers to bypassing a seller (or seller combination) were not assessed in that fashion, the only seller that could be held guilty of monopolization under Section 2 would be one possessing the *sole* source of supply—*i.e.*, a total monopolist. That the district court below fell into that error is demonstrated by the court's ruling that monopolization could not be shown unless it were proven that ASCAP and BMI "blanket licenses are the *sole* method for securing performance rights" (Pet. App. 118a) (emphasis added). But total monopolists rarely, if ever, exist outside of economic textbook models, and total monopoly is certainly not the test for a Section 2 violation, as this Court's statement in *Associated Press* made clear.

That reasoning, if generally adopted, would obliterate Section 2. No buyer ever "wants" to deal with a seller (or, particularly, with a combination of sellers) who possesses monopoly power. He does so only because of the disadvantages of obtaining the product by another means (or the relative undesirability of substitute products). If "relevant markets" were generally defined to exclude the seller whose products or service buyers did not "want" in that sense (which is the only rational sense in which the word could have been used by the district court below), then Alcoa's aluminum, for example, would be excluded from the very market which, in the actual decision on point, Alcoa was held to have monopolized.

It may well be that what the court intended to imply was that a blanket license could not comprise a separate market because it represents only the *means* of obtaining the underlying product—individual performance rights (which, in the district court's view, are "fungible" (Pet. App. 119a)). Whatever one's view of the fungibility of music compositions, however, it is obvious that performance rights are not as "fungible" as aluminum. From the buyer's standpoint, therefore, buying aluminum from foreign suppliers was simply another *means* of buying a fungible product. And there is certainly far more basis for holding a blanket license non-interchangeable with a bypass than there was in holding Alcoa's aluminum non-interchangeable with aluminum from abroad.

Finally, with respect to monopoly power, the district court "noted" that "the power of ASCAP and BMI to control the price even of their own blanket or per-program licenses is sharply curtailed under the decrees" (Pet. App. 120a). Whether it is "curtailed" at all, let alone "sharply," is a highly dubious proposition; but what is perfectly clear is that neither organization's monopoly power is eliminated by its decree.

The BMI decree, of course, does not even contain provisions for rate-making proceedings (E 1568). Hence, the power of that combination to increase prices is limited only by the right of a user to institute an antitrust suit against it—a procedure which in prospect neither eliminates monopoly power nor would even continue to exist if the district court's ruling in this case were affirmed.

ASCAP, as a result of its consent decree, may not be a total monopolist; but it is well-settled that control over price, for Section 2 purposes, does not mean the power to raise price to the total monopolist's profit-maximization point. It is sufficient if the "handicap" the seller "can impose" (*Associated Press* v. *United States*, 326 U.S. 1, 17 n.17 (1945)) enables the seller to raise price above what would be competitive levels and without concern for the prices of other products or services.

The simplest confirmation that ASCAP possesses such power is the testimony of ASCAP's President, defendant Stanley Adams, that, in determining the fees to charge broadcasters for an ASCAP license, ASCAP does not take into account what BMI is charging (D 27-28; *see* E 533; Fagan D 471-73,488-89). In fact, ASCAP's Chief Economist, Dr. Fagan, readily admitted the conclusion of monopoly power itself (D 410; *also see* Brettler D 201).

Moreover, in terms of ASCAP's ability to raise price above competitive levels, it is plain that the possibility (historically unutilized) of a judicial rate-making trial constrains ASCAP no more than, if even as much as, the alternative sources of supply available in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) and *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). The opportunity of litigating the "reasonableness" of cartel rates is no substitute to the user for the price-paring dynamics of a competitive marketplace; and the actual inflationary impact on price of the blanket licensing

system has been established on this record as a matter of fact (*see* Point IV. A., *supra*).

Furthermore, judicial relief is always available against combinations which have monopolized and fixed prices. By prosecuting a Section 2 claim, the victim of such monopolization can always eliminate the combination's power over price. This is precisely such an action. The fact that the victim can also pursue a consent decree remedy for a noncompetitive, but theoretically "reasonable" fee no more precludes a finding of the monopolist's power over price than does the availability of Section 2 litigation.

POINT VII

DEFENDANT'S PRICE-FIXING, TYING AND MONOPOLIZATION CONSTITUTE COPYRIGHT MISUSE.

We think it clear, by necessary implication from *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962), and *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and by square holding in *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949),* that the fixing of performance rights prices on copyrighted music constitutes copyright misuse—as the court of appeals held here (Pet. App. 23a n.29). On the same precedents, the use of a copyright pool for tying and monopolization also constitutes misuse of the pooled copyrights. *Ibid; see also Tempo Music, Inc.* v. *Myers*, 407 F.2d 503 (4th Cir. 1969); *Greenbie* v. *Noble*, 151 F. Supp. 45, 61-62 (S.D.N.Y. 1957); *Columbia Pictures Corp.* v. *Coomer*, 99 F. Supp. 481, 482-83 (E.D. Ky. 1951).

In *Loew's*, the government sought to enjoin, as illegal "tying" under the Sherman Act, the practices of the motion picture distributor defendants of conditioning the

*See also, *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 900, 904 (S.D.N.Y. 1948).

licensing of certain pictures to television broadcasters on the broadcasters' agreement to accept and pay for a larger package of films. The primary issue in the case—and the one of particular significance to this discussion—was whether the first category of films possessed sufficient economic power as to permit a finding that it had been used unlawfully to "tie" the broadcasters' acceptance of the other motion pictures. This Court held,

> "The requisite economic power is presumed when the tying product is patented or copyrighted . . . ." 371 U.S. at 45.

Since patents and copyrights are thus equated in terms of the "economic power" requisite to satisfy that element of a tying offense, it is logical to conclude that the same public policy hostility that makes extensions of that economic power, in the patent monopoly, patent misuse should apply to extensions of the copyright monopoly and make those copyright misuse. In combination, *Loew's* and *Paramount* stand for exactly that proposition.

Thus, in *Loew's*, the Court explained that the patent misuse doctrine was predicated on

> ". . . hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products." *Id.* at 46.

And previously in *Paramount* the Court had explained that extensions of the copyright monopoly were condemnable as an antitrust offense (tying) *in reliance* on the principle (*i.e.*, public policy hostility) against similar extensions of the patent monopoly:

> "That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials. . . .
>
> "We approve that restriction. The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." 334 U.S. at 157-58.

It is therefore clear that the public policy hostility against extensions of the patent monopoly applies equally to extensions of the copyright monopoly. And since that public policy hostility is enough to make an extension of the copyright monopoly an antitrust offense, as this Court held in *Paramount*, it must, *a fortiori*, be enough to make it copyright misuse.

Moreover, the patent misuse doctrine was itself originally predicated on the authority of copyright infringement cases in which proprietors were denied relief because of acts violative of other public policies. Thus, in *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942), the Court, immediately after pronouncing the patent misuse rule, stated,

> ". . . see also, for application of the like doctrine in the case of copyright, *Edward Thompson Co.* v. *American Law Book Co.*, 122 F. 922, 926; *Stone & M'Carrick* v. *Dugan Piano Co.*, 220 F. 837, 841-43. The patentee, like these other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of his grant by the courts where it is being used to subvert that policy."

Thompson and *Stone* were cases in which the copyright proprietors seeking infringement relief were guilty, respectively, of (1) copying from some other copyrighted publication a portion of the work for which it sought protection, and (2) including in the infringed manual

certain misleading advertising material. Neither act should have formed sufficient ground for the traditional unclean hands defense because neither caused injury to the defendants. *Compare Weiss* v. *Mayflower Doughnut Corp.*, 1 N.Y.2d 310, 316, 135 N.E.2d 208, 210, 152 N.Y.S.2d 471, 474 (1956), *with Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-16 (1945). Both, however, obviously abridged the public interest and constituted misuses of the copyrights involved. The Court's citation of those cases, then, in its landmark patent misuse decision, as "the like doctrine in the case of copyright", clearly presaged that the employment of a copyright in practices violative of antitrust policy and statutes would provide the basis for a "like" copyright misuse defense*—the proposition that was later established by necessary implication in *Paramount* and *Loew's*.

For the contrary view, BMI relies principally on the line of decisions from *Kiefer-Stewart Co.* v. *Joseph E.*

*The Court also stated in *Morton Salt*, *supra*, 314 U.S. at 491, that a "patent affords no immunity for a monopoly not within the grant," citing *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 228-30 (1939), an antitrust decision which had expressed exactly the same view with respect to the copyright monopoly. Since that statement was made as a predicate to the establishment of the misuse rule denying infringement relief to patentees who attempted so to extend their statutory monopolies, this Court's reference to a decision which held that similar extensions of the copyright monopoly were violations of the antitrust laws implies the existence of the copyright misuse defense as well.

Following *Morton Salt*, the only infringement cases considered by this Court that involved the misuse defense, with one exception, have been patent cases. That one exception is *Mazer* v. *Stein*, 347 U.S. 201, 218-19 (1954), in which the Court stated, with respect to a misuse of copyright defense:

> "Nor do we think the subsequent registration of a work of art published as an element in a manufactured article, is a misuse of the copyright. This is not different from the registration of a statuette and its later embodiment in an industrial article."

Seagram & Sons, Inc., 340 U.S. 211 (1951), through *Perma Life Mufflers Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), which it deems inconsistent with the misuse doctrine. But there are substantial reasons why the limitation placed on antitrust defenses to antitrust claims (or to ordinary actions for breach of contract) are inapplicable to the copyright or patent misuse defense.

In the first place, the doctrine of copyright or patent misuse is premised ultimately on the view, inapplicable to the *Kiefer-Stewart* type of case, that the recipient of such a special, publicly conferred benefit as a statutory monopoly, who abuses the public interest through the use of that monopoly, should not be entitled to enforce it during the period of abuse, particularly since the monopoly was granted primarily to serve the public interest and only secondarily for private reward. *United States* v. *Paramount Pictures, Inc.*, *supra*, 334 U.S. at 158; *United States* v. *Loew's Inc.*, *supra*, 371 U.S. at 46-47.

In the second place, antitrust affirmative defenses *are* allowed to antitrust or contract actions where upholding the claim (and striking the defense) would place the court in the position of enforcing the plaintiff's illegal actions. *Compare, e.g., Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909), *with Kelly* v. *Kosuga*, 358 U.S. 516 (1959). In a copyright misuse case such as the present, the court would be placed in precisely that position, since misuse is predicated on the unlawful extension (by anticompetitive acts) of the very statutory monopoly which the infringement claimant seeks to enforce. Thus, while the *Kiefer-Stewart* rule precludes a defense which could thwart the procompetitive objectives of the antitrust laws, the misuse defense serves the same procompetitive purposes by thwarting the anticompetitive extension of a statutory monopoly beyond the limits of its grant.

In the third place, where an antitrust defense to an antitrust or contract claim can be stricken without putting the court in the position of implementing the allegedly illegal acts of the plaintiff, the defendant can still institute his own antitrust action or counterclaim based upon the facts set forth in any such defense. On the other hand, the copyright or patent misuse doctrine may afford little solace to an infringement defendant unless it can be asserted in the infringement suit, for in some cases, the acts constituting misuse may not rise to the level of an antitrust claim.

Thus, this Court, from *Morton Salt* through *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 133-41 (1969), has strengthened, not weakened the misuse doctrine without the slightest harm to the *Kiefer-Stewart* line of decisions.*

*BMI also cites *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), as a case "announcing a balancing test" for the application of a misuse doctrine (Br. 35). The *Alfred Bell* court did so, however, based on its misreading of *Kiefer-Stewart* as a partial retreat from this Court's patent misuse decisions of the 1940's, such as the *Mercoid* cases (*Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661 (1944); *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1944)) and *Morton Salt*. While that interpretation might have appeared plausible in 1951, the year in which both *Kiefer-Stewart* and *Alfred Bell* were decided, the more recent decisions of this Court and other federal tribunals prove that reading simply to have been incorrect. *See, e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 133-41 (1969); *Brulotte* v. *Thys Co.*, 379 U.S. 29, 32-34 (1964); *Hensley Equipment Co.* v. *ESCO Corp.*, 383 F.2d 252, 260-64, *modified*, 386 F.2d 442 (5th Cir. 1967); *American Securit Co.* v. *Shatterproof Glass Corp.*, 268 F.2d 769 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959). Indeed, the balancing of supposed equities has no place in monopoly misuse law, if for no other reason than that misuse can be "purged" by the monopoly holder and his statutory right thereafter enforced.

BMI additionally cites several lower court decisions holding that "copyright misuse is not a defense" in an infringment action (Br. 35 n.27). All but two preceded *Morton Salt*. In one decision coming after, *Harms, Inc.* v. *Samson House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd per curiam sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959), the court of appeals stated, with respect to the defense, that

The distinction BMI claims between the supposed economic importance of copyrights and patents is wholly beside the point, even if such a sweeping generalization were valid.* The misuse doctrine is no more affected by the fact that other patents are stronger than some copyrights (or *vice-versa*) than it is by the fact that some patents are stronger than other patents. For the misuse concept derives, not from the varying degrees of economic importance inherent among statutory monopolies (patent or copyright), but from the impermissible *extension* of those monopolies inherent in the antitrust offense.

Moreover, this case obviously does not deal with the misuse of a single copyright, but with the misuse of copyright pools that control markets and suppress compet-

"No evidence was offered on the point; the district judge did not decide it and neither do we." *Id.* at 496.

In the other case, *Buck* v. *Cecere*, 45 F. Supp. 441 (W.D.N.Y. 1942) which was decided only months after *Morton Salt*, the court did not refer to *Morton Salt* at all.

The cases BMI cites preceding *Morton Salt* seem to have been decided principally on the ground that the antitrust remedies provided by the Sherman Act are specified and exclusive, with citation to this Court's decision in *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921) ("settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing rights created by it are exclusive"). *See, e.g., Buck* v. *Newsreel, Inc.*, 25 F. Supp. 787 (D. Mass. 1938). The patent and copyright misuse doctrines, however, as *Morton Salt* makes clear, are defenses that arise independently of the Sherman Act. *See also, e.g., Zenith Radio Corp.* v. *Hazeltine Research Inc., supra*, 395 U.S. at 140.

*And, of course, it is not. There are many copyrights, such as those on the Disney characters, "Star Wars" or "Happy Birthday" that generate far more income and economic power than many thousands of patents. As is similarly well known, there are many copyrights that support whole lines of businesses, and many patents that do not.

Indeed, if the generalization were true, it would prove too much. For if licensing systems of (to use BMI's words) "overwhelming economic importance" could be upset on patent misuse grounds, with the consequent dislocations of such industries, there should be no difficulty barring those guilty of copyright misuse from obtaining infringement damages.

ition more pervasively than any single patent is likely to do, or than any pool of patents is now doing. If there were any basis for believing that the misuse doctrine as applied to a single copyright were overly "harsh," as BMI claims without justification, this Court could so hold in a case which raised that question.

BMI further contends that a copyright misuse doctrine would be "draconian" in that it would permit "a wrongdoer to go free" (*i.e.*, infringe with impunity) (Br. 33). What is elided in that contention, beside the fact that the misuser is himself a "wrongdoer", is the further fact that the very reason the user of a copyrighted work (or, as here, a copyright pool) may not have a license is because he has not capitulated to the very scheme of misuse which, until purged, renders the copyright unenforceable.

BMI also argues that an antitrust misuse defense could "dwarf" a copyright infringement action (Br. 36). So could a patent misuse defense dwarf a patent action—and the alternative is to allow the owner of the statutory monopoly to prosecute infringements irrespective of his misuse.

BMI notes that the misuse defense applies to users other than infringement defendants who are injured by the misuse (Br. 34). Again, that question is not involved here, for CBS is plainly the direct target of the misuse in question; again, there would be no more "harshness" to this rule than there is in the patent situation; and, again, the copyright proprietor is always free to purge himself of such misuse. Moreover, since the misuse defense is an equitable doctrine, if this Court were to believe that it should not be applied to a user who has not been injured by the misuse, this Court, again, could so hold in an appropriate case.

But, say the BMI defendants, the "harshness" is "exacerbated" here, for since BMI affiliates do not sit on the BMI Board, they will have "extreme difficulty" in purging themselves of misuse and thus their incomes will be "jeopardized" (Br. 37). Can it really be imagined that the BMI Board would persist in licensing practices declared by this Court to be unlawful misuse; or that, under the unreal assumption that it did, the music publishing corporation affiliates would continue to authorize that Board to license their music. BMI says that the latter step "would be self-defeating, since direct licensing of most music users is impossible" (Br. 37)—but even if that were true, and such "impossibility" were a defense to cartelization, those same affiliates could, in the light of the assumed intransigence of the BMI Board, form a new group or join ASCAP (of which they are already members through other publishing subsidiaries).

Finally, BMI defendants complain, again on "harshness" grounds, that no one has given them "any warning" of this prospective misuse result (Br. 36-37). But how much warning do they need, even assuming, contrary to law, that any were relevant. CBS's letter to BMI of December 19, 1969 (JA 31-32), constituted precisely such a warning; the complaint in this case was such a warning (JA 19); the *NBC* proceeding against ASCAP was such a warning; and certainly the Department of Justice's position in that proceeding that present licensing practices were price-fixing and illegal *per se* (*see* NBC App. 15a) was such a warning. And while these were warnings that defendants chose to ignore, preferring to perpetuate their domination of the market and their suppression of price competition, they cannot, in reason, be heard to proclaim that the lack of warning excuses their continued misuse.

POINT VIII

DEFENDANTS ARE ALSO GUILTY OF COPYRIGHT MISUSE UNDER THE PRINCIPLES EXPRESSED BY THIS COURT IN *ZENITH*.

In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 139 (1969), this Court held that

> ". . . . conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent does amount to patent misuse." 395 U.S. at 135.

The Court further stated,

> "We also think patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use." 395 U.S. at 139.

There has never been any serious question but that those principles were applicable to ASCAP's and BMI's insistence on a blanket license. Thus, as to CBS's right "to pay only for actual use," under a blanket license it would be forced to pay ASCAP the same royalty during the course of each licensing year whether it used 10,000 or 1,000 compositions in the ASCAP pool. Moreover, as to improper "conditioning," since the blanket license expresses royalty payments as a percentage of sales (or, at ASCAP's option, an equivalent flat dollar amount), the inference must be drawn, as it was in *Zenith* (*id.* at 136), that the license enables ASCAP "to garner as royalties a percentage share of the licensee's receipts from sales" as to programming that uses no ASCAP music (and, in fact, on programming that uses no music at all).

The controversy surrounding this point has thus always centered on the per-program license which defendants say frees CBS from the necessity of paying a royalty to ASCAP on a program using no ASCAP music. Of course, ASCAP's general counsel admitted at trial that a per-program license was not designed for a large-scale user (Finkelstein Tr. 3769-70); that is plainly the fact (see Addendum E); and the court of appeals noted that the "utility of the per-program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming" (Pet. App. 7a n.9). But even apart from that fact, we believe it clear that both the rule stated in *Zenith* and the principles underlying it are as applicable to per-program licenses as they are to the straight blanket.

For as the court of appeals also found, "[t]he per-program license is simply another form of blanket license" (Pet. App. 6a); "neither permits the licensee to pay only for those compositions which it actually uses, and the per-program license should not be confused with a per-use license" (Pet. App. 6a-7a) since,

> "Under the per-program license, once there is any use, the amount of use is irrelevant. It does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same." (Pet. App. 7a n.9)

Hence, ASCAP's rejection of CBS's request for a per-use license and offer of a blanket or per-program license was a "rejection of [the] licensee['s] proposals to pay only for actual use." *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, *supra*, 395 U.S. at 139.

Moreover, what the *Zenith* rule is designed to prevent is the statutory monopolist's use of leverage to obtain compensation, not in dollars, but in an undertaking by the licensee that will remove his incentive to use competing substitutes for the licensor's patents (or copyrights), thus discouraging his shopping in a competitive market for such patents (or copyrights). While compensation in dollars is perfectly consistent with the policy of patent and copyright grants, compensation in terms of the type of understanding just described steps over the line sheltered by that policy and trenches upon grounds secured by the antitrust statutes.

Obviously, such an undertaking is equivalent to "tying." Instead of the copyright proprietor conditioning the license to one copyright on the acceptance of another, he conditions it on the licensee's agreement to pay for the licensed monopoly on a basis which will make economic sense to the licensee only if he uses the licensor's second copyright in preference to competing substitutes. That the rule is designed to remedy such anticompetitive effects—*i.e.*, such "tying"-type abuses—is made clear by the Court's express reliance, in its formulation of the rule, on the "tying" decisions (395 U.S. at 135-36).

That such abuses inhere in the per-program format is equally clear. For the per-program licensee is required, as noted, to pay the same "percentage-of-sales royalty" for a one-hour program using five seconds of ASCAP music as for a one-hour program using 50 minutes of ASCAP music. As to that program, therefore, the same leverage which creates the need for ASCAP per-program license coverage of any single composition will economically preclude the direct licensing of any other ASCAP composition, and effectively discourage the use of any composition in the BMI pool.

Indeed, given the applicability of the misuse doctrine to copyrights (which is demonstrated above) and the applicability of the *Zenith* misuse doctrine to blanket licenses (which cannot be seriously disputed), any ruling that it was inapplicable to per-program licenses would produce highly anomalous results. It would, for example, require a holding that ASCAP was guilty of misuse when it insisted upon the payment of royalties on a 5-minute program which used no ASCAP music (the result under the blanket license) but was entirely innocent when it insisted upon the payment of royalties on a one-hour program which used 30 seconds of an ASCAP song (the result defendants have urged applies under the per-program format). The plainly unlawful case would subject only 5 minutes of non-ASCAP-music programming to the ASCAP royalty base, whereas the hypothetically "lawful" case would subject 59½ minutes of non-ASCAP-music programming to the ASCAP royalty base.

Finally, the fact that the *Zenith* rule may condone percentage-of-sales royalties as to radios embodying licensed patents (without requiring a variance in the rate depending upon the number of patents used) should not absolve a percentage-of-sales royalty as to each television program embodying a licensed copyright (where the royalty fails to vary with actual use).

In the radio example, if the same royalty rate applies to each product embodying a licensed patent irrespective of whether one or ten patents from a package license are used, competition is, undeniably, restrained. On the other hand, percentage-of-sales royalties (on products embodying licensed patents) is the normal way of licensing patents. For any attempt to vary the royalty rate depend-

ing upon the number of patents used (*e.g.*, 1% of sales where 1 patent is used, 2% where 2 patents are used, and so forth) would generally be impractical to administer (*e.g.*, in the sense of attempting to ascertain which of potentially many process patents included in a package license had actually been used in the manufacture of the product).

When music performance rights, however, are licensed directly, the normal (and almost universal) method is for music publishing corporations to charge users a flat dollar fee for each use (whether, for example, in a motion picture or phonograph record) (*see* pp. 18-23, *supra*). In fact, even though ASCAP and BMI, for anticompetitive purposes, charge users a percentage of their annual income or equivalent fixed annual fee (or, in rare instances of per-program licensing,* a fixed percentage of program income or flat program fee), both organizations make distributions to their own members on a dollar-per-use basis (*see* pp. 25-28, *supra*). Obviously, organizations that distribute on a per-use basis can charge on a per-use basis they could, indeed, charge television networks essentially the same per-use amounts as they distribute to their members.

In short, the considerations justifying the percentage-of-sales royalty system for licensing patents are not applicable to the package licensing of music performance rights, much less warrant their present anticompetitive restraints.

---

*All commercial television networks and, with *de minimis* exceptions, all commercial television stations in the United States have held, and now hold, standard blanket licenses (Pet. App. 7a n.9; E 5 (para. 9)).

POINT IX

THE COURT OF APPEALS' GUIDELINES ON RELIEF ARE CONSISTENT WITH ITS HOLDING ON LIABILITY.

Although this appeal concerns only the liability issues of the case, so much of defendants' attack on the decision below is predicated on this claimed "inconsistency," we believe it appropriate to note why the per-use remedy, in the unique circumstances of the present market, provides a sensible and efficacious form of relief—even though it is also price-fixing (albeit of a less restrictive nature than the blanket) and is not our preferred alternative.

The central feature of a per-use licensing system is that it will permit the user to license directly, by freeing it from the present necessity to pay twice for that privilege. Other provisions that might be added would simply be means of implementing that goal with fairness to all parties.*

The most obvious alternative would be a straight injunction against defendants' continuing to fix prices through ASCAP and BMI or otherwise in their licensing of television networks (which would effectively oust ASCAP and BMI from the market, since neither can continue selling without fixing prices). But the following factors must be taken into account in considering that approach:

1. Since performance rights have been licensed collectively since ASCAP's creation in 1914 (except for the direct licensing of motion picture production companies spurred by the decision in *Alden-Rochelle, Inc.* v *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948)

---

*For example, each ASCAP and BMI publisher could be given the right to cancel ASCAP's or BMI's authorization to license CBS under the per-use license with respect to any or all of the compositions of which it is the copyright proprietor, and with respect to any or all of the uses which might be made of such compositions. That cancelation right could be exercised on reasonable notice or at periodic intervals (*e.g.*, quarterly). The cancelation should not be operative, however,

(two opinions)), there do not, as the district court found, presently exist adequate marketing facilities for the direct licensing of published music to television networks. Hence, the effective date of the straight injunctive remedy would have to be deferred for a period sufficient to permit such facilities to be created.

2. Although the district court predicted that the publishers' music-in-the-can leverage would not be imposed to the extent of concerted "holdups" (Pet. App. 102a-105a), there cannot be any rational dispute that networks, lacking licenses to such music, would have to pay substantial premiums in excess of competitive prices in order to use the films and programs in which such music was recorded.

There are two possible solutions. In *Alden-Rochelle*, the court enjoined ASCAP and its members from ever enforcing their copyrights as to such performances (80 F. Supp. at 904-05). The alternative is to have music-in-the-can licensed by ASCAP and BMI on a per-use basis.

3. If the latter alternative were adopted, the per-use rates the court set for those uses would likely have the same price-stabilization effect as the present system or the full per-use system. But the blunt fact

with respect to music-in-the-can or the use of any music taped or filmed prior to the cancelation (and thus in reliance on an ASCAP or BMI license) even though the tape or film was broadcast subsequently. Such subsequent broadcast would, of course, be subject to payment of the fee specified in the per-use schedule.

(In the light of that prospective withdrawal right, defendants' persistent contention (*e.g.*, Br. 32) that the per-use system would create a "ceiling" on direct-licensing prices is plainly wrong. Any music publishing corporation that desired to license any particular compositions at a price exceeding the per-use rate would only have to withdraw that composition from the per-use license. Obviously, the per-use rate could not be a "ceiling" for a composition to which the license did not apply.)

is: the same would be true for a period of time if the straight injunctive remedy were adopted with the *Alden-Rochelle* solution for music-in-the-can—for there is simply no way to erase the historical fact that ASCAP (from the members' perspective) has been selling performance rights to television networks for approximately $1,000-a-use.

In short, the methods for removing the anticompetitive effects ingrained by cartels of long-standing duration and national scope are not nearly as readily discerned as the illegality of those systems.

In contrast, these points regarding the per-use remedy should be noted:

1. One clear advantage it has over the straight injunctive remedy is that it may be made immediately effective. Whatever performance rights were not initially obtainable directly from publishers (given their present lack of personnel and facilities to negotiate and handle direct-licensing transactions), would be available from the ASCAP and BMI pools at per-use rates.

2. Per-use licensing is far less restrictive than blanket licensing for the reasons already discussed, and would immediately permit a network user to commence direct licensing for some portion of its requirements. Though the existence of per-use rates would stabilize direct-licensing prices, there would nevertheless be, even at the outset, some considerable price competition among copyrighted compositions, since each would be *separately* priced.

As noted above, the stabilization effect of the present ASCAP rates would persist for some period after the entry of a straight injunction. Since per-use rates could initially be set (and periodically adjusted) more nearly to reflect competitive market price equilibrium levels,

per-use relief could, in this sense also, more quickly remedy past anticompetitive effects.

3. Given the actual occurrence of direct-licensing transactions, and given the realization by publishers (driven home by the very result in this case) that direct licensing was here to stay, sufficient incentive would, at long last, exist for those companies actually to create direct-licensing facilities, which would itself enable the networks to obtain an increasing portion of their requirements by this means. That development should, in turn, prompt ASCAP's and BMI's withdrawal from the market, in the manner that ASCAP ultimately withdrew from the movie rights field after the *Alden-Rochelle* decision prohibited ASCAP from licensing theaters and led to movie producers' licensing directly from publishers.* Indeed, if ASCAP and BMI did not withdraw at that time, the court, under retained jurisdiction, could fashion whatever further relief was then indicated.

In terms of overcoming the "disinclination" factor noted by the court of appeals (Pet. App. 22a) (publishers' resistance to direct licensing stemming from their preference for blanket licensing), the per-use and the straight injunctive remedies would have equivalent effect. Since in either event the networks would not have blanket licenses and, given the holding here, could not realistically be expected to return to that system, the loss of that system to publishers would have already occurred; it would not, in the court of appeals' words, continue to "dull [their] incentive to compete" (Pet. App. 20a).

---

*According to the Yale Note, *C.B.S.* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 YALE L.J. 783, 801 n. 104 (1978), "The projected process would be a classic example of market forces acting to break down cartel discipline [citing G. STIGLER, THE ORGANIZATION OF INDUSTRY 42-45 n.68 (1968)]".

able measure of "competition a market that has been closed by defendants' illegal restraints," *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947); provide a continuing, transitional means for licensing compositions separately until entirely adequate direct-licensing facilities could be installed; spur the creation of those facilities; and thus, on the whole, afford sensible interim relief until the market could be made fully competitive. While the court of appeals did not articulate all those reasons for the guidelines it issued to the district court, the points are evident, and the result, sound.

Of course, the relief issue is not now presented for review. What is, may be clearly resolved: for defendants fix prices, they are guilty of tying, monopolization and misuse; and the precise details of remedying that restraint may be left to the normal lower court processes.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

December 16, 1978.

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IN THE
Supreme Court of the United States
October Term, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ADDENDA A-E TO BRIEF FOR RESPONDENT

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ADDENDUM A

Publisher and Writer Hostility to Licensing Other Than Through ASCAP

1. The Findings of the Courts Below

The district court made the following findings regarding the attitudes of publishers and writers with respect to the direct-licensing possibility and the reasons supporting that attitude:

> "It is true, as CBS relentlessly emphasizes, that most of the writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket licensing system. The preference is no surprise in view of the fact that the blanket license is the only way in which performance rights have been marketed to television networks for nearly thirty years. Moreover, the writer-publisher testimony establishes that, from their standpoint, the system is trouble-free and self-executing and the financial rewards are satisfactory. None of them expressed the wish to exchange their present, relatively uncomplicated way of doing business for what they viewed as a new mode involving unfamiliar procedures and possible financial uncertainty." Pet. App. 83a.
>
> "We may agree that the cited testimony proves that writers and publishers prefer the present system and are apprehensive of dealing directly with CBS. . . ."* Pet. App. 84a.

---

*In the next sentence, the court stated,

"However, this by no means proves the obverse: that copyright owners would refuse to deal with CBS if it discontinued its blanket license and insisted upon dealing on a direct licensing basis. . . ." *(footnote continued on next page)*

While those findings are adequate in law to establish the propositions for which the evidence was adduced (*see* Points I. D. 2., III. B., IV. A., V., VI. and VIII. of our brief), they nevertheless understate the record to a marked and significant extent.

In view of the court of appeals' rulings of law on each of those points, it was unnecessary for it to consider the extent to which the vehemence of defendants' admitted antipathy to price competition exceeded the district court's moderated description. But the magnitude of that difference is so plain on the face of the testimony as to reinforce each of those points many times.

2. The Evidence

As to the extent of the resistance itself (which the district court did not assess and attributed to only a "strong preference"), perhaps the most striking testimony consisted of the publishers' assertions that they would not deal with CBS or solicit it for performance rights business in the event it terminated its ASCAP license (or, as the questions were alternatively stated, if all networks canceled their ASCAP licenses or ASCAP were enjoined from licensing networks). Whether such testimony proves that they would not in fact deal, or would boycott CBS, is beside the point; it certainly demonstrated a more intense basis

---

The "obverse" is not a proposition which was called into question in this case; and thus that holding is irrelevant, as is discussed more extensively in Points I and III of our brief. Nevertheless, the sentence is quoted here because it seems to indicate, contrasted with the sentence quoted above in text, that the phrase "we may agree" was intended to mean "we do agree" rather than "we might or might not agree". In either event, however, as is shown below, the evidence clearly proves more than the mere "preference" and "apprehension" referred to.

for resistance to direct licensing than a mere "preference" for the present system. For example:

> *Mr. Vogel* (President, Jerry Vogel Music Co., Inc., proprietor of one of the most important catalogs in the industry, PX 883):
>
> "Q. Suppose on January 1st of next year, 1973, CBS cancelled its ASCAP license so that it could acquire no rights to music through ASCAP, and that the other two networks, ABC and NBC, kept their ASCAP licenses so they were continuing to license through ASCAP; would you make more effort under those circumstances than you do now to solicit either the television network or the producers of its programs to use your music?
>
> "A. On what stations?
>
> "Q. On the CBS network, which would include—
>
> "A. No, I would take them off the mailing list. You say you have no ASCAP license?
>
> "Q. We have no ASCAP license.
>
> "A. So I have to take you off the mailing list.
>
> "Q. You would do that because they had no ASCAP license?
>
> "A. That's right. But I hope it don't happen.
>
> "Q. Would you make any effort to license them directly?
>
> "A. No.
>
> "Q. No, you would not. Can you tell me briefly why not?
>
> "A. I am a member of ASCAP." (D 913-14)

"Q. Suppose CBS cancelled its license today and tomorrow the producer called you?

"A. I couldn't answer that. I don't think—I would have to stick with ASCAP. I think most of the people would have to stick to ASCAP.

"Q. Why is that?

"A. Well, we know what we got, and we don't know what we are going to get." (D 915)

"Q. . . . . Would you be willing to at least attempt to negotiate that kind of arrangement?

"A. I don't think so.

". . . .

"Q. But if CBS had cancelled its license presumably they wouldn't use any works in the ASCAP repertory unless they got the rights from the publisher or the writer.

"A. Well, we got the other two networks." (D 916)

"Q. Suppose that ten of the leading publishing companies in New York started licensing CBS directly, CBS producers directly, would you then be more inclined to start talking to producers of those programs if they called you up?

"A. No, ten publishers. I don't think so, no." (D 929)

Mr. Morris (President of the Edwin H. Morris & Co., a named defendant, and Board member of ASCAP):

"Q. Let us assume the broadcasters all cancelled their ASCAP licenses [today] and they refused to deal with ASCAP.

". . . .

"You would be in a position where you weren't getting any performance rights royalties because they weren't using your music and if you were successful in getting broadcasters to take direct licenses to your music, you would be getting some revenues. Why wouldn't you try to get them to take direct licenses?

"A. I don't believe that would be the direction I would be inclined to go.

"Q. Why not?

"A. Simply because I believe that the organization of ASCAP best represents the interests of the writer and myself." (D 656-60)

"Q. If you wanted to get a higher price for your music from CBS, how would you go about doing it?

"A. I have no intention of ever going in that direction. I am completely satisfied with what ASCAP remits to me from the various sources." (D 752-53)

Mr. Goodman (Officer and part owner of Jewel Music Publishing Co.):

"Q. Do you believe that once ASCAP has undertaken to offer licenses to a category of users that the members should refrain from dealing with those users?

"A. I do." (Tr. 1632)

As to the reasons for that antipathy, those and other publishers evinced, not merely the recognition noted by the district court (that present "financial rewards are satisfactory" and price competition portends "financial uncer-

tainty"), but an acute perception of the monopoly power that enables those "rewards" and so extreme a fear of price competition as to exceed even that warranted by the economic facts. Thus:

> *Mr. Brettler* (Executive Vice President of defendant Shapiro, Bernstein & Co., Inc.; ASCAP officer; and Board member of ASCAP, NMPA and The Harry Fox Agency, Inc.):
>
> ". . . I personally have the feeling that direct licensing of television networks would be . . . self-annihilation as an industry. . . ." (D 353)
>
> "In unity there is strength and in disunity there is weakness. The unity of ASCAP which is basically a legal monopoly, we have more strength in combining this negotiation, throwing all our copyrights together into a vast pool of music that makes it very attractive to a user to deal with ASCAP. We don't have to face the problem of all of us individually dealing with a user or a producer. . . ." (D 201)

Mr. Morris:

> "Q. . . . . Let us say that the price that CBS is willing to pay you is the same price in effect you are now getting from ASCAP in distributions when CBS uses your music?
>
> "A. No, I consider there is a moral obligation here to the writers with whom I am in partnership with and I couldn't possibly entertain anything of that kind.
>
> "Q. The money would be the same. I am having difficulty understanding that.

> "A. The very structure of what I believe would no longer, to me, exist, so I can't see that.
>
> "Q. I guess what I am really asking you, Mr. Morris, is, what is the structure of what you believe?
>
> "A. I believe in ASCAP because of my experiences over the years and it seems to be the only practical way for all elements to do business.
>
> "Q. So you would approach any negotiations with a broadcaster or a network like CBS with a great hesitancy to enter into a direct licensing transaction?
>
> "A. I believe that would be the end of the road for me as a publisher." (D 661-62)
>
> "Q. You believe that . . . ASCAP's performance of the licensing functions as ASCAP now performs that function is in the best interest of music publishers in general and the Edwin H. Morris Company in particular?
>
> "A. I do." (D 679)
>
> "Q. So that for music publishers to engage in the direct licensing would worsen their position?
>
> ". . . .
>
> "A. My business judgment is it would be disastrous for me." (D 681-82)
>
> "Q. In other words, your bargaining position as an individual is less than your bargaining position as part of ASCAP?
>
> "A. I would say yes.
>
> "Q. ASCAP has a superior bargaining position than anyone or group of its publishers?
>
> "A. You have answered it.
>
> "Q. That is true?
>
> "A. It is true." (D 719-20)

Mr. Goodman:

"Q. Do you believe that it's wrong for ASCAP members to compete with ASCAP for the licensing of performance rights?

"A. Yes.

"Q. Why?

"A. Because I think as individuals we have no strength.

"Q. Then you believe it's important as a publisher to combine with other publishers and have a common licensing agent?

"A. No doubt in my mind.

"Q. Do you believe that when individual publishers enter into direct licenses with users which bypasses ASCAP that that weakens the strength of ASCAP?

"A. No. doubt." (Tr. 1631-32)

Mr. Vogel:

"I have the writers. I just can't spoil the writers' living either, can I?

"Q. Would it spoil the writer's living for CBS to deal with you—

"A. I think so." (D 932-33)

"Q. Do you think that the price of music would go down, the revenues of your company would go down if CBS started dealing directly with publishers?

"A. Oh, sure.

". . . .

"Q. Would this be at all because you were doing the negotiating instead of ASCAP?

"A. I think so." (D 933-34)

Mr. Brackman (General Manager of defendant Essex Music, Inc., one of the group of companies known collectively as "The Richmond Organization" or "TRO"):

"Q. Do you think that such a development [a CBS bypass attempt] would be good for your company?

[Objection omitted]

"A. I don't know. I would be very suspect if a company came to me directly.

"Q. Can you tell me why you would be suspect of the company which came to you directly?

"A. Every time a user comes to you directly you wind up getting less than you started out with, particularly when they are a big conglomerate.

"Q. You mean less for the performance rights than you were getting before?

"A. Whether it is performances, or mechanical, or any other form of revenue." (D 110)

It should be noted that the depositions of Messrs. Brettler, Morris, Vogel and Goodman were taken before ASCAP moved to terminate all depositions on the ground that those previously conducted had been "aimless," "ineffective" and "improper" (ASCAP's Memorandum in Support of Motion For Protective Order, September 20, 1972, p. 1)—a motion which required extensive briefing and disclosures as to how singularly effective those depositions had been. Thereafter, ASCAP witnesses were noticeably more guarded in their expression of these points. But even the witnesses subsequently deposed, as well as the writers and publishers whom ASCAP itself called to testify at the trial, could not entirely mask the strength of their feelings for the continuation of the present system

and the "regret" with which they would view any change (*Washington*: "It is a perfect world," D 969, and a direct licensing system "would be a very upsetting thing for me personally" and "an economic hurt to me as well," D 947; *Chiantia*: "I am perfectly happy with the system we have now," Tr. 2919; *Coleman*: "we are perfectly content with ASCAP," D 334; *Broido*: "would regret" the change because the present system is "probably the best one that has been devised" and would thus "hope" that, in the event of a bypass "CBS would return to the ASCAP system," Tr. 3492, 3500-01; *Copland*: would be "rather regretful" about change because the present system is "a comfortable arrangement," Tr. 3486; *Green*: the present system is "effective," "convenient" and "good," Tr. 3473-74; *Shulman*: direct licensing would be "bad" for his company, and impose a "huge burden" and represent a "radical departure" from the "business environment that I have functioned in" and, in the event of a bypass, he "would hope" that CBS "would see the light and go back to ASCAP and continue under the blanket license system," Tr. 3132-34).

Moreover, there are at least two other factors underlying this antipathy to direct licensing, neither of which were referred to in the district court's opinion, but both of which were proven without question.

First, the publishers' own resistance to licensing directly would be buttressed substantially by the attitudes of their writers, who share the publishers' economic incentives and have additional interests at stake. Distributions to the major writers are based on a four-fund plan of deferred compensation, the advantages of which would be considerably lessened if the principal licensee group (television networks) were to succeed in channeling a substantial portion of those funds into a competitive system. (Writers under the four-

fund plan have, as a result of past performances, accumulated claims on ASCAP's current revenues. If those revenues decline sharply, so does the value of such claims.) Moreover, writers in general rely on the present ASCAP system as a means of preventing publishers' licensing of performance rights without writers' consent—an objective so strong as to form the root cause of the historical conflict between writers and publishers in other fields, but make writers quite avid in their agreement with publishers in this one. [Fisher Tr. 1687-90, 1694-1706, 1736-37, 4824; Nathan Tr. 3905, 3909-10, 3965-67; E 139, 448, 458, 480, 622, 831, 849; Lane Tr. 992, 1010-11, 1024-25, 1109-12, 1149; Marks Tr. 2675-78; Chiantia Tr. 2976; Green Tr. 3464, 3467, 3469-70, 3473-74; Chiantia D 321-22; Coleman D 337-38, 345-46; Fagan D 453-56; Morris D 645-49, 661, 731, 741-43; Washington D 941-43, 947, 961-62, 969, 974-77, 984-89; Vogel D 932-33]

Thus, as to the one occasion, more than three decades ago, in which a major publisher, Warner Brothers, attempted to split off from ASCAP and commence the licensing of broadcasters on its own, Mr. Morris, who was then operating head of the Warner Brothers music publishing companies, still recalls the "rather violent" (D 648) reactions of writers and believes that the "lesson" (D 680) of that experience would be applicable today to a network bypass attempt:

> "Q. Did you object to Warner Brothers removing its repertoire from ASCAP?
>
> "A. Yes.
>
> "Q. Do you remember the grounds on which you made that objection?
>
> "A. I could see nothing but alienation of all the writers. At that time Warner had the most

foremost names in the music world, Hammerstein, Rodgers & Hart, Vincent Youmans, Kern, Harbach, all of them, Cole Porter.

"At the end, I could only say this, at the end of this period, virtually all of these writers who had had contracts, some were about to expire, left. Those with contractual obligations continued until their terms expired.

". . . .

"Q. Did you talk to any of the writers during this period about the Warner Brothers withdrawal of its repertoire from ASCAP?

"A. Yes. At the direction of Herman Starr we had some meetings with some of the composers in an attempt to placate, show them what the objective was.

"My only function then was to introduce Starr to these people and be an observer. He presented the arguments.

"Q. What was the reaction of the writers to the Warner Brothers withdrawal?

"A. Completely antagonistic, in every area. Even those writers I have not mentioned that were currently employed by Warner through me on the coast in the motion picture division were rather violent.

"Q. Do you remember any specific points they made?

"A. There were a number of pictures in production and there was no way of exploiting these pictures other than through the medium that broadcasting offered. In those days the record business was practically nonexistent from the standpoint of

reaching the public. So, your one medium that really had impact was through exploitation. So, the writers were very bitter. Cole Porter in particular with a show called Jubilee which opened in Boston at that time and had one very famous composition which later became Begin the Beguine, was highly incensed.

". . . .

"Q. Was there any expression by the writers as to the loyalty to ASCAP?

"A. Yes.

"Q. And the move by Warners was really an act of disloyalty.

"A. Yes." (D 646-49)

"Q. Based on your experience, particularly the Warner Bros. experience, the Warner Bros. withdrawal of its catalog from ASCAP, do you think there is a good chance that writers might have some adverse reaction to this possibility [the direct licensing of CBS]?

"A. I believe so." (D 731)

ASCAP's economic expert witness, Mr. Nathan, on questioning by the court, also testified:

> "THE COURT: . . . Don't you think it is reasonable to assume that the writer does believe that it is an advantage to be a member of ASCAP because he doesn't have to compete for the price?
>
> "THE WITNESS: I suspect, your Honor, that is true. . . ." (Tr. 3909)

Secondly, this resistance factor—and the premium that would have to be paid to overcome it—is strengthened still further by the fear that direct licensing of one customer (*e.g.*, CBS) would proliferate (*e.g.*, lead to the

direct licensing of other television networks and possibly other users as well), and the clear recognition by each major publisher and writer of how important his own resistance is to preserving the present system against just such a proliferation.

Publishers who annually supply the preponderance of television network needs are a highly concentrated group. The top 14 alone furnish approximately 45% of CBS's requirements (measured by ASCAP credits); they annually receive 60% of ASCAP's total publisher distributions; and television network performances account for 40% of their ASCAP receipts. Each such publisher has a particularly strong vested interest in preserving the present system against change; each knows the importance that his assistance to a bypass would have to its success; and each knows that each other major publisher has the same strong economic incentives against allowing that change to occur. [PX's 94, 416; Fisher Tr. 1699-1700, 4800-01; Nathan Tr. 4114-16; Goodman Tr. 1631-32; Brettler D 235; Chiantia D 280; Morris D 719-20; Vogel D 915, 929]

The writers' concentration is effectively achieved by membership in AGAC. During the periods covered by the ASCAP music study 42 to 46% of all ASCAP compositions performed on CBS programs were written by AGAC members (PX 843; AX's 159, 287). In the first quarter of 1972 alone, to license the published AGAC music would have required securing more than 1,200 consents from such writers (PX's 429, 461, 842; AX's 160(a)-(q)). AGAC's views on the subject of direct licensing were graphically displayed in the 3M incident reviewed in Addendum B. But the reasons for resistance could not have been expressed any more strongly than in the speech given by ASCAP's President, Stanley Adams, to the AGAC membership on that subject:

> "There can be nothing as important as presenting a solid front across the negotiating table. If we dissipate our energies fighting among ourselves, we will have exhausted the ammunition we need in the battles ahead.
>
> "the beginner and the veteran, the big writer and the small one, the rock 'n' roll, the ballad, the novelty, the popular and the production writer all nestled together under one umbrella—an umbrella that will cover us just as long as we collectively hold it up and not one second longer.
>
> "So that when someone thinks he is getting an addition by making a little deal on the side that sabotages our basic contract, he is really sabotaging himself—he is making a little hole in the fabric of the umbrella. Every hole causes a leak, enough leaks and the rain pours in and I have never met any person who can walk in the rain without getting wet." (E 454-55)

Although Mr. Adams' specific reference in the concluding paragraph was to the "basic" AGAC contract (which AGAC writer members sign with music publishing corporations), he left no doubt in that address that the writers' most important organization, ASCAP itself, had the same purpose of "presenting a solid front" and the same vulnerability to leaks "in the fabric of the umbrella":

> "[L]eft to our own devices we have attempted to get together to protect and foster the inherent rights that we all possess. These devices have taken the form of organizations—all bearing different labels to define a particular segment of creative endeavor. But, whatever the label, they all have a single purpose.

"To resist the splitting of our ranks so that we can be picked off one by one." (E 449-50)

Likewise, Mr. Brettler admitted his concern that his direct licensing of 3M "might set some precedents that I would be sorry about"—specifically:

"Q. Precedents for what? That is, that you might be sorry about.

"A. We described the benefits of joining ASCAP. If every ASCAP member licensed every use directly and ASCAP dissolved because everybody was flying off in a million different directions and ASCAP had nothing to license, you bet I would be sorry about it, and so would every member in view of my testimony." (D 235)

Mr. Chiantia testified that, before he would consider dealing directly with CBS, he

"would have to know how I could exist beyond that time having to license CBS directly, and I would have to know what other possibilities were involved, what other doors would be opened. Would I then start licensing roller skating rinks directly? Would I then start licensing nightclubs directly? Would I then start licensing Joe's Hot Dog Stand directly? Where would it end? I'd have to know all of that in front. . . ." (D 280)

And as noted by Albert Berman, managing director of the Harry Fox Agency, "in this particular field you have the herd instinct, of course" (Tr. 951-52).

The same resistance factors were evident from the reaction of writer and publisher Board members to CBS's

effort, by the institution of this suit, to initiate a per-use licensing system. Although such a system has not previously existed in this market, per-use licensing is hardly a novel concept to the publishing industry (Brettler D 147-49, 252), and publishers and writers are clearly aware of what that system portends in terms of price competition, as the evidence reviewed below shows. Not the slightest consideration, therefore, was given by the ASCAP Board to the possibility of exploring the development of such a system on a voluntary basis. Mr. Brettler testified that, prior to the commencement of the action, "we were aware that CBS was *threatening* at the time to go in another direction" (D 251). According to ASCAP's President, Mr. Adams:

"Q. Was there any discussion as to why you should defend the suit?

"A. I guess when you are going to think somebody is going to put a match to your house you generally get a hose to put out the fire.

"Q. Was the CBS complaint viewed by you as putting a match to your house?

"A. It's possible. Any match is liable to burn down a house." (D 7-8)

Another Board member, Mr. Washington, in testifying about his discussions with other writers concerning the suit, testified that "I would try to calm them and say 'Don't worry, we have had these things come up during the years' " and "I try to keep them from pushing the panic button" (Dep. 132-33). As to Mr. Washington's own "point of view based upon my 45 years as a writer,"

". . . it would not be a comfortable thing, I'll say, for me.

> "Q. Why is that, sir?
>
> "A. I am not used to this kind of world. It is like landing on Mars. You'd say, 'How are we going to live there?' " (D 984-85)

Similarly, some years ago Mr. Chiantia, in his position as President of the NMPA, wrote to the President of AGAC,

> "Let us meet our problems and our adversaries together and draw strength from our common cause." (D 322)

When asked who "our adversaries" are, Mr. Chiantia replied,

> "It is very clear who our adversaries are. Our adversaries are those who wish to take advantage of us and [give us] less than we deserve.
>
> "In this case, CBS might be described as an adversary." (D 323)

Inevitably reinforcing the mutual awareness of publishers and writers of the importance of each member's resistance to direct licensing in a network bypass attempt would be the exchange of views that would doubtless occur in industry councils and otherwise, for that is exactly what happened in the 3M and *Shenandoah* incidents (Addenda B-C).

On the 3M matter, for example, Mr. Chiantia testified to having discussed the 3M proposal with "Mr. Leon Brettler, and many other publishers, Mr. George Joy, Eddy Joy [of Joy Music, now part of the Aberbach group], Richard Rosenthal [of Mills Music, now part of Belwin-Mills Publishing Corp.], and . . . others, many others" (D 305). As he later stated, "There was a lot of talking going on [at] that time" (D 310). Views and advice on

the matter were widely exchanged (Arrow Tr. 1373-74; Brettler D 214-220, 229-30; Chiantia D 305-09, 311-14, 329-30; Herman D 634; Wattenberg D 1008-09) and intensive interest was shown in what position others would take. Paramount/Famous Music Corp., after being approached by 3M, adopted a posture of "wait and see" because "we wanted to check and see if we were going about it the right way, and if we were doing anything wrong in negotiating with 3M" (Herman D 632). Mr. Brettler also was unwilling to make a commitment to 3M until he was certain it "was lining up really a sufficient contingent of publishers . . . and it looked like [3M] was going to be able to make a direct deal" (D 219). And, as Howard Richmond, President of The Richmond Organization, instructed his then Director of Business Affairs, Alan Shulman, "nothing goes ahead until there's an industry decision" (E 880).

3. The Bases on Which the District Court Disregarded or Discounted Such Evidence.

The principal error committed by the district court in viewing such evidence was an error of law rather than fact. As indicated earlier and in our brief, the court did not assess the evidence reviewed above to determine whether it established the several propositions to which it applied (*see* Points I. D.2., III. B. and IV. A. of our Brief), but only to determine whether it proved a further and irrelevant proposition—specifically, whether "the 'disinclination' of writers and publishers to leave the blanket system would ripen into a refusal to deal directly" (Pet. App. 86a).*

---

*On that the court found that, while

> "most of the writers and publishers who testified expressed concern similar to those of CBS deposition witnesses" (*ibid.*),

those called by ASCAP at trial

In the process, however, the district court did discount some of the evidence involved; and for that, its grounds were clearly erroneous.

For example, the court noted "in passing that only one of the four deponents on whose testimony CBS relies in support of the 'disinclination' issue was called by CBS to testify at trial" (Pet. App. 86a). Apart from the fact that CBS relied on more than four deponents (as the evidence reviewed above shows), the statement implies that CBS's failure to call ASCAP members at trial somehow minimized the significance of their deposition admissions.

Two of the four witnesses referred to are officers of named defendants in this case; the other two are officers of corporate members of a defendant class. The testimony referred to constituted unequivocal admissions of highly pertinent facts.

There is no rule of evidence requiring the party who has obtained such admissions in a deposition from an opposing party to put that opposing party on the stand to reiterate his admissions. On the contrary, it was defendants' obligation to call those witnesses at trial if they wanted the admissions explained away; and their failure to do so, or to examine other witnesses on these subjects, not only left the evidence unrebutted, but also required an inference that the testimony would have been adverse to defendants had it been elicited. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 225-226 (1939); *International Union, United Automobile, Aerospace and Agricultural Implement*

"persuasively suggested that they would deal directly with CBS, at least *ex necessitate*" Pet. App. 90a.
It is only the "*ex necessitate*" part of that conclusion which is pertinent to the issues of the case.

Workers of America (UAW) v. *NLRB*, 459 F. 2d 1329, 1335-36 (D. C. Cir. 1972); *Dow Chemical Co. (U. K.)* v. *S. S. Giovannella D'Amico*, 297 F. Supp. 699, 701 (S. D. N. Y. 1969); *and* II *Wigmore, Evidence* § 285 (3d ed. 1940).*

Additionally, the court attacked both Brettler's and Morris's admissions on the ground that, "when read in their entirety, the depositions take on an entirely different hue" (Pet. App. 85a). To establish that, the court then quoted certain passages from those depositions which could give the admissions a different "hue" only if the passages themselves were ripped from context and *not* "read in their entirety."

Thus, as to Brettler's admissions, the court noted,

> "For example, Brettler testified that 'there is no question of the fact that we would negotiate something' if a producer requested performance rights (Dep. 184-85), and that 'hordes' of other publishers would do the same. (Dep. 304-05)" Pet. App. 85a.

The court did *not* note, however, that Brettler's statement about "hordes" of other publishers was expressly condi-

*The district court also devoted considerable space to the proposition that the "three CBS witnesses who predicted that writers and publishers would refuse to deal" (Sipes, Wright and Vincent) were "unimpressive, particularly inasmuch as none of them had ever spoken to a publisher or writer in relation to performance rights licensing" Pet. App. 80a-82a. That discussion forms one of the more curious passages in the opinion. For while the views of those three witnesses regarding writer and publisher resistance were naturally raised on both direct and cross examination, the testimony in that regard related solely to their own states of mind; it was neither elicited for the purpose of proving such resistance, nor was it even mentioned, let alone relied on for that purpose, in the proposed findings of fact CBS submitted to the district court after trial.

tioned on the assumption "that ASCAP suddenly stopped licensing" (Brettler D 187); and the court did *not* note that Brettler's statement "that we would negotiate something" was expressly conditioned on a number of assumptions (which Brettler himself labeled as "unreal") including the assumption that "we agreed that we wanted to proceed [with a producer's] using this song" (D 139).

More fundamentally, of course, the fact that Mr. Brettler "would negotiate something" even under the unreal assumption that he wanted to, hardly removes the impact of his admissions that he regarded that prospect with aversion.

As to Morris, the discoloration of the "hue" of his admissions was achieved, in the district court's view, by a passage of his deposition in which he asserted that he would "talk to" producers and "network people" who approached him for direct licenses and "even go to [their offices]" (Pet. App. 86a). To be sure, Mr. Morris agreed that he would go to the "network people's" office *if* they had called him (the passage quoted by the court); but then he immediately testified (in the next passage *not* noted by the court):

> "Q. Let's suppose that the deal is a license which covers a substantial portion of your catalog. not all, but a substantial portion, and they will pay you $411 every time they use one of your compositions in a feature performance and a percentage of that $411 if they make theme uses or background uses of the music covered by the license.
>
> "Is this a deal that would interest you?
>
> "A. I am no longer in your office.

"Q. Why?

"A. I don't like it.

"Q. Why?

"A. I just don't like it, that is my opinion.

"Q. Why?

"A. I don't consider it anything that I am interested in.

"Q. Why?

"A. I just——

"Q. You would want more money?

"A. I am not saying what I want. You are talking songs, partial catalog. This is all within the realm—I don't know, this is not something that interests me." (D 710-11)

In short, the admissions reviewed above fully stand for the propositions for which they are cited; and, to the limited extent the district court discussed those admissions, it both erred in law in failing to recognize the points to which they were relevant, and erred in fact by relying on out-of-context quotations to diminish their effect.

A ΔΩΩΣΖΩΩΜ B ΔΩΩΣΖΩΩΜ C ΔΩΩΣΖΩΩΜ D ΔΩΩΣΖΩΩΜ E ΔΩΩΣΖΩΩΜ

ADDENDUM B

The 3M Incident

As discussed in Points I.A. and D. of our brief, the fact that defendants are actually selling at fixed prices within their respective combinations makes it unnecessary to consider what the effect of the combinations would be on any putative direct-licensing prices; and yet it is also true, as the court of appeals found, that the blanket licensing system inevitably "provides a disinclination to compete" (Pet. App. 20a, 22a). This record, however, is unusual in that it does contain a case study of both the aversion of publishers and writers to the direct-licensing prospect and the effect of that attitude on price—and that is the incident reviewed in this Addendum.

The facts involved are also pertinent to the barriers to a bypass (which underlie the CBS claims of tying, monopolization and *Zenith* misuse) and defendants' anticompetitive purposes (which would be considered under any rule-of-reason analysis). They were not reviewed for those purposes by the district court (which focused solely on the irrelevant question of whether they proved that music publishing corporations would boycott CBS in the event of a bypass attempt), or by the court of appeals (which focused only on whether they proved that a direct licensing market "will not work"—a contention we did not advance, and to which they are equally irrelevant).

We turn first to the background facts which are essential to an understanding of the incident but which, in largest part, were not referred to in the district court's opinion.

1. Background Facts.

In 1964, the Minnesota Mining and Manufacturing Corp. ("3M") took preliminary steps toward the development of a new concept in background music services: the sale of tape players and background music cartridges to

doctors, small stores, restaurants and other establishments not serviced by the established wired music companies (*e.g.*, Muzak, Seeburg). The project was called the M-700 to designate the fact that the cartridge would contain performances of 700 musical compositions. To make the product marketable, 3M had to obtain performance rights licenses to the music it planned to incorporate on the tapes, thus sparing its customers that task. 3M approached ASCAP for such licenses. [E 833; Arrow Tr. 1257-59, 1263-67; *see also* E 853, 881]

The 3M-ASCAP negotiations commenced on or about February 5, 1964. By October 1964, the parties were still deadlocked with respect to several key structural aspects of the proposed transaction.* ASCAP's demands were incompatible with 3M's plan to sell the equipment, rather than lease it; and the sale approach was, in 3M's judgment, an essential part of the prospective appeal of the project to the new class of users to whom it would be directed. [E 838, 840, 842; PX's 485A-B; Arrow Tr. 1266-67, 1269-72, 1298-99, 1312-13, 1317-19; *see also* E 853, 881; Brettler D 208-12]

Because of the impasse reached, 3M concluded that while there was little possibility of ever resolving these problems, there was no realistic possibility of doing so prior

*For example, ASCAP adhered to the position that the license cover the entire ASCAP repertory, rather than a limited number of songs; that the licensing period for all purchases of the 3M equipment terminate on the same date regardless of the date of each user's purchase; and that songs placed on the ASCAP restricted list during the licensing term be eliminated from the coverage of the license (as they were under ASCAP's licenses with the wired music services). Under ASCAP blanket licenses with broadcasters, ASCAP has the right to remove certain songs from the coverage of the licenses when members have requested that their use be restricted because of over-exposure. Once 3M tapes containing any such music were sold to ultimate users, it would not have been possible for 3M to recall the tapes and eliminate restricted compositions. [*See* citations collected at the end of the paragraph in text.]

to April 1965, which was 3M's internal deadline for commencing production of the tape players and cartridges. 3M was therefore presented with two alternatives: it could abandon the project (a step which it considered seriously in light of the fact that its investment in the project to that date had not been extensive) or it could attempt to obtain performance rights to 700 songs directly from music publishers. It decided to pursue the latter course. [Arrow Tr. 1312-13, 1317-19, 1324; *see also* E 881]*

In that effort, 3M's principal representatives were Ray Lindgren, the general manager of the project, and Allen Arrow, a New York lawyer prominent for his representation of music publishing corporations and known personally to most of the publishers he and Lindgren sought to interest in the 3M proposal. [Arrow 1256-57, 1268-69, 1325, 1498-99; Chiantia Tr. 2987-88]

Their basic approach to each publisher was the same. They related in some detail the history of their negotiations with ASCAP and explained the structural problems which had caused those negotiations irretrievably to break down. They therefore advised the publishers that the success of the M-700 project depended upon publishers' willingness to license 3M directly and that their failure to do so would preclude the development of an important

*The district court stated that "ASCAP suggested to 3M that it deal directly with copyright proprietors" (Pet. App. 95a). What the court did *not* note is that no one on the 3M side of the negotiations lingered under any illusion that that was an ingenuous suggestion. Reports were soon received by 3M that "an effort was being made" by "ASCAP as a society, ASCAP members, ASCAP directors" to "prevent us from getting direct licenses" (Arrow Tr. 1358-59), and ASCAP's general counsel advised 3M that it "would not be able to produce its First Series without an ASCAP contract" (E 868). Mr. Finkelstein's statement was recorded in a contemporaneous document by 3M's lawyer, Allen Arrow, and while Mr. Finkelstein was called to the stand by ASCAP, he was not asked to deny that he made that statement.

new source of income for publishers. [E 853, 881; Arrow Tr. 1327-28, 1330, 1350, 1378-79, 1394, 1400-01, 1409, 1413-14, 1419-21, 1425, 1492-93; Goodman Tr. 1554; Chiantia Tr. 2988; Brettler D 202-11, 216-18, 221-22, 232; Chiantia D 304]

Each publisher was offered performance fees of 3¢ per song, per cartridge sold, and mechanical fees of 2¢ per song, per cartridge—the latter of which was plainly in excess of prevailing market price levels in mechanical rights as pointedly illustrated by the far lower figures accepted by publishers in later years, in connection with the M-1200 project, as to which 3M did accept a blanket license from ASCAP.* [E 652, 853, 871, 881; Arrow Tr. 1328-29, 1350, 1378-79, 1394, 1400-01, 1409, 1413-14, 1420-21, 1474-75; Herman D 634-35; Wattenberg D 999-1000; *compare* Berman Tr. 841 *with* 3M PX's 23, 39, 41]

Moreover, 3M offered each publisher a guaranty of $300 per song, per year (so that for a publisher having 100 songs on the tape, the guaranty would be $30,000 a year). That guaranty was based on minimum projected sales of 6,000 tapes a year (*i.e.*, 3¢ + 2¢ per song, per tape sold x 100 songs = $5 x 6,000 tapes sold = $30,000). 3M's more realistic projection was that it would annually sell

*3M offered publishers 2¢ per song, per tape for a mechanical rights license. At the projected, and realized, sales volume of 12,000 tapes per year, a publisher would annually receive $240 in mechanical rights fees from 3M for each song (E 833; Arrow Tr. 1474-75, 1478, 1484-85; Herman D 635). The going rate for a mechanical rights license for wired music service was $5 per song, per year, irrespective of the number of installations (Berman Tr. 841). In fact, prior to the time Mr. Arrow approached publishers for direct performing rights licenses, he anticipated obtaining mechanical rights licenses at the $5 per song figure (Arrow Tr. 1323) and that is the rate for which 3M did obtain them on the M-1200 series (*see, e.g.*, 3M PX's 23, 30, 41). Thus, 3M offered publishers, on the M-700 series, 48 times the going rate for mechanical rights licenses.

twice that number of tapes (thereby paying a publisher having 100 songs on the tape $60,000 a year) and 3M met and eventually exceeded that estimate. [E 652, 833, 853, 871, 881; Arrow Tr. 1329-30, 1350, 1378-79, 1474-75, 1478, 1484-86; Chiantia Tr. 2988; Herman D 635-36]

The guaranties themselves (and thus obviously the more realistic projected royalties) represented, for the publishers approached, amounts that were equal to or substantially higher than the publishers' entire ASCAP distributions in respect of all wired music companies which were established operations servicing the large office buildings, shopping centers, hotels and factories throughout the country.* [PX's 418, 459; Arrow Tr. 1258-59, 1492-93]

Furthermore, each publisher was told by 3M, and had independent reason to know, that it would have a larger number of songs on the M-700 tape if it licensed 3M directly (and would thus earn far higher royalties) than if 3M had dealt with ASCAP, having ASCAP's entire pool of music from which to choose. [E 871; Arrow Tr. 1384-85; Brettler D 223]

*Executives of the major publishing companies are necessarily aware of the amount of income they realize from significant revenue sources (*see* Chiantia Tr. 2938). It is, therefore, a fair inference that, during the 1964-65 period, they were either aware, within close estimates, of what their wired music earnings were or knew that such earnings were insubstantial in relation to the 3M offers (which, as discussed more fully at pp. 11, 18, 36, *infra*, would have represented to these publishers clearly significant additions to their performance rights royalty income).

While wired music distribution figures could not be obtained during the course of pre-trial discovery for the 1964-65 period in which 3M approached the publishers, they were produced for the years 1967-69. In virtually all cases, publishers' wired music distributions displayed an escalating trend, so that it is reasonably certain that the pre-1967 wired music distributions were less than those recorded after that date. Nevertheless, the comparisons made here with the 3M guaranties are to the 1967-69 figures. PX 459 shows the ASCAP credits earned by publishers with respect to wired music and similar services. Those figures are multiplied by the dollar value of an ASCAP publisher's credit (PX 418) to arrive at the figures for wired music distributions.

In comparison with any CBS attempt to license its needs directly, 3M should have faced little publisher resistance, even given general publisher antipathy to licensing outside the cartel.

First, the 3M project involved a new, experimental use, limited to a finite number of songs. As such, it presented little, if any, possibility of instigating a chain reaction of direct licensing among other users, none of whose needs were as predictable or capable of being confined to so small a number. [Fisher Tr. 1691-94, 4796-98; Nathan Tr. 4121, 4124-25; Arrow Tr. 1492-93; Chiantia Tr. 3024-25, 3027-28; Brettler D 215-18, 236-37; Chiantia D 279-80, 308-09; Morris D 682]

Second, the 3M offer represented an entirely new source of income to publishers and entailed virtually zero overhead cost. The doctors' offices and, in largest part, the small commercial establishments to which 3M would sell its tapes, were *not* paying royalties to ASCAP or anyone; and to obtain this new revenue, it was unnecessary for publishers to create any direct licensing facilities or, indeed, take any affirmative steps at all. [Fisher Tr. 1691, 4796; Nathan Tr. 4120-21; E 652, 853, 871, 881; Goodman Tr. 1554; Shulman Tr. 3105-06; Brettler D 215-18; Herman D 638; *see* pp. 3-5 *supra*]

Third, 3M was not asking the publishers to compete on a price basis; it made the same price terms available to every publisher (indeed, 3M gave each publisher a "most favored nation" clause), and those price offers obviously contained substantial premiums tendered to induce publishers to license in this new fashion—*i.e.*, directly to a customer. [*E.g.*, E 1275-76 (para. 18); p. 4, *supra;* pp. 11-40, *infra*]

Fourth, publishers could have no reasonable expectation, by refusing to deal, of forcing 3M back to ASCAP on the M-700 project. It was apparent that 3M could not conclude an agreement with ASCAP (and many publishers approached verified this fact with ASCAP). Moreover, while 3M's needs were quite limited, and the time it had to fill those needs relatively long (six months), 3M had comparatively little at stake if it could not obtain those rights by direct licensing, other than writing off the design costs and the time of the project personnel (a far cry from the vulnerable position to which a television network would be exposed, with nothing short of its competitive viability at risk and immense time pressure involved). [Fisher Tr. 1685-86, 1688-90, 1961-94; Nathan Tr. 4122, pp. 3-4, *supra;* pp. 11-40, *infra*]

Fifth, if publishers in fact refused to license 3M, the project was likely to be abandoned with a consequent loss to the music publishing industry of these windfall amounts. [Fisher Tr. 1691-92, 4796; pp. 2-3, *supra*]

Despite those facts, nine of the major publishers approached by 3M either flatly refused to deal or dragged the negotiations out so long as to moot the question. As disclosed by contemporaneous documents or testimony, each of those publishers shared the determination to keep direct licensing out of the performance rights field—an objective which would logically apply with considerably magnified force to any attempt by a television network to bypass the ASCAP system. [Fisher Tr. 1699, 4796-98; pp. 11-32, *infra*]

2. The Findings of the District Court.

The ultimate finding reached by the court below was

"that the incident, if it proves anything at all, estab-

> lishes that copyright proprietors would deal with CBS for direct licenses." Pet. App. 97a.

Whether they "would deal" is, again, beside the point; but the findings and comments on evidence relied on below to reach that conclusion must be considered for a clear understanding of this matter.

The district court below stated that 3M, on the first series of M-700 tapes, "signed contracts with 27 of the 35 publishers it approached" and only eight manifested an "unwillingness" to deal (Pet. App. 95a, 97a). Unquestionably, it is the first series that is most important in testing publisher and writer hostility to the direct-licensing prospect, because, at the time of the second series, 3M's disassociation from ASCAP was an established fact. The court's numerical findings on both series, however, are plainly wrong.

It was not eight publishers that refused to deal; it was nine.* It was not 27 publishers that signed contracts with 3M on the first series; it was eight.** (Shapiro, Bernstein; MCA; Jewel; Bourne; PIC; Hi-Ti; Consolidated; and Compton—E 1300, 1412, 1507; 3M PX's 24, 32, 50-52, 56).

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*Although the district court opinion recites that eight publishers refused (copying the error in BMI's post-trial brief), the opinion lists the nine publishers—Chappell, MPHC, Famous, Morris, Berlin, Richmond, Robbins, Bregman and Frank. Pet. App. 97a-99a.

**Eighteen other publishers dealt with 3M on the second series (E 1231, 1244, 1257, 1278, 1289, 1328, 1339, 1352, 1379, 1400, 1432, 1446, 1458, 1471, 1496, 1517; 3M PX's 57, 59). Discovery was not conducted with regard to the attitudes of those firms because of the relative unimportance of the second series and the publishers themselves. Those 18 firms combined account for only approximately 3.5% of the CBS music uses, according to the ASCAP music study (E 660; AX 160).

Moreover, the district court compared the publishers which dealt with those unwilling to do so, as if they were publishers of equal rank; and as if those which dealt, did so for reasons that would be applicable to CBS. Nothing could be farther from the truth. As will be shown below, of the eight publishers that dealt, one publisher admitted that he so regretted the decision that he would not do it again, and would *not* license CBS directly (Jewel—Goodman Tr. 1631-32); and two others conceded that the decision had to be "wrestled with" or caused considerable turmoil within the company and then gave reasons for overcoming such resistance that demonstrate a far greater hostility to dealing with CBS (Shapiro, Bernstein—Brettler D 235-37; MCA—Arrow Tr. 1364-65; Chiantia Tr. 2991-92, 3017-18, 3028; Chiantia D 294, 299, 312). The remaining five publishers which dealt were so minor in stature that, in total, they accounted for 0.1% of the ASCAP credits generated by CBS music uses during the period covered by the ASCAP music study. In contrast, the nine publishers who declined to deal with 3M accounted for 40.5% of the CBS-generated ASCAP credits during that period.* [E 660; AX 160]

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*Equally confused is the footnote at Pet. App. 95a, where the district court concluded that 3M "paid $6 less per tape than the amount of its first offer to ASCAP." In point of fact, 3M offered to pay ASCAP $27 for performance rights per tape for three years (E 833) *and* would have paid publishers a total of $10,500 for mechanical rights ($15 per song x 700 songs = $10,500; Arrow Tr. 1323; Berman Tr. 841)—which, when averaged into the 18,000 tapes it expected to sell in three years, comes to an additional 59¢ per tape. Thus, if 3M had obtained licenses from ASCAP, 3M would have paid $27.59 per tape for performance and mechanical fees. By licensing directly from publishers, 3M instead paid $35.00 per tape (5¢ x 700 = $35) or, $7.41 per tape *more* than 3M offered to pay through ASCAP.

The court also misstated ASCAP's first offer, erroneously believing that it was "per tape", while in fact, ASCAP was only willing to license "per location" (E 840), and 3M was planning to (and did) sell each location more than one tape. Thus, the prospective cost to 3M of ASCAP's offer was not comparable to 3M's cost of licensing directly.

While the district court did find that

> "There is considerable evidence that the publishers 3M approached viewed the M-700 proposal with some reservations" Pet. App. 95a,

it commented that

> "the evidence as to the 3M incident was developed in large part through documents and deposition testimony; and included considerable hearsay in the testimony of Allen Arrow" Pet. App. 96a-97a

—and concluded

> "We cannot give significant weight to arguments as to the state of mind (*e.g.*, disinclination) of the publishers approached by 3M based on such evidence." Pet. App. 97a.

The question that naturally arises is, why not? How else can the state of mind of an opposing party be proved when it is against his interests to admit it. If it cannot be proved by admissions in contemporaneous documents, by admissions elicited in depositions and by admissions testified to by a member of the Bar (who was obviously giving testimony against the interests of his publishing clients), then there could be no realistic possibility of proving state of mind.

Also, with respect to state of mind, the court below observed that the attitudes reflected in the 3M incident were not applicable to a CBS bypass because "CBS and copyright proprietors would be trading for a very different horse than did 3M" (Pet. App. 96a). It is, however, precisely those differences—the five differences outlined above which the

court below never mentioned—which make the facts of this incident applicable here *a fortiori*.

Finally, the court noted that "it *appears*" that "there were legitimate business objections" that underlay the publishers' rejection of the 3M proposals rather than "general opposition to direct licensing" (Pet. App. 97a). If that statement was intended to be a finding of fact, it is the most clearly and remarkably erroneous finding in this opinion, as we will now show.

3. The Publishers That Declined to Deal.

a. Chappell.

Chappell, Inc., was the first publisher approached since it "had the catalog most sought after by 3M" (Arrow Tr. 1326). The terms 3M offered Chappell were set forth in Lindgren's letter of November 27, 1964, to Chappell's Managing Director, M. E. Ricketts:

> "We have offered you a minimum of 200 titles out of the 700. At five cents per title per tape, $10.00 per tape, we would be paying you $300,000 in the next three years and it would go on and on after that." (E 886)

To put that figure in perspective, the mechanical rights portion of that amount ($120,000) was more than three times the total fees ($37,000) which Muzak pays to the entire music publishing industry for electrical transcription rights to more than 3,000 songs. [Berman Tr. 842; *see* Wattenberg D 993-96, 999-1000]

Although Mr. Ricketts initially indicated that he might be prepared to deal, in the event ASCAP "didn't do it or couldn't do it" (Arrow Tr. 1332), he expressed sufficient question as to whether 3M had exhausted the ASCAP

route as to prompt Mr. Lindgren to explain that point further:

> "In regard to the ASCAP matter and a license we tried to get on behalf of the ultimate purchaser of the new 3M equipment and music tapes, it was not that they refused to give us a license but, rather, that the terms of what they offered were such that we felt that our sales would be seriously inhibited; also, because of these terms, there was a distinct possibility that 3M would abandon the project entirely.
>
> ". . . .
>
> "It was after the last meeting, in sheer desperation, that Allan and I dropped in to see you, feeling we had just about exhausted any possibility of an equitable solution with ASCAP.
>
> "I outline the foregoing because, in our discussion the other day, I sort of got the impression that you thought we had made no attempt to get a license from ASCAP. To the contrary, we tried our best to deal with them." (E 883)

Shortly thereafter, however, Chappell indicated through its counsel, Philip Wattenberg, that it "would not enter into this kind of agreement with 3M" (Arrow Tr. 1338). The reason given by Wattenberg was "that Mr. Ricketts felt, in particular, that the performing rights should be licensed by ASCAP and that Chappell was therefore unwilling to make a direct license with 3M" (Arrow Tr. 1338-39; *see* Wattenberg D 1010-11).

Some years later, 3M sought a mechanical rights license from Chappell on the M-1200 project (as to which performance rights were licensed by ASCAP). As Arrow wrote to Ricketts, this proposed agreement, unlike 3M's prior offer to directly license performance rights, should "not cause you to search your conscience before executing it" (E 846). Ricketts' response set forth his own version as to why Chappell had rejected that prior 3M proposal:

> "As you know, I was all in favour of the 3M deal from the start, but it was Chappell & Co. Inc. that would have been in trouble with ASCAP. . . ." (E 848)

Although the implications of that evidence are stark, none of it was referred to by the district court. Instead, the court found that Chappell refused the 3M proposition

> "because of concern that the sale of the M-700 tape would, in effect, put a perpetual free performing right in the hands of 3M's purchasers unless ASCAP licensed and policed those rights. . . ." Pet. App. 97a.

While "policing" might have been a "concern," the evidence hardly justified a conclusion that it was a primary, let alone the exclusive concern. These tapes had a short life expectancy and were likely to be unusable after four or five years (E 461; Arrow Tr. 1321-22). Even if 3M did not renew its direct licenses with publishers after the initial three-year term, and the establishments were not policed, that would give them one or two years of "free" performances. Matched against the $300,000 that 3M was offering Chappell, the notion that one or two years of un-

licensed use should form a major deterrent to accepting that money is implausible in the extreme.

The establishments to which 3M was expecting to sell their machines were those which were for the most part playing radios and not paying performance fees to ASCAP. Thus, even if after the initial three-year period, some users attempted to infringe, the result was no different from the already existing state of affairs. As Leon Brettler stated:

> "I really felt that this device 3M had, this program they had, was going to open up markets. The music was being used anyway and we weren't getting a dime by and large. We don't get a dime when a restaurant uses a commercial broadcast live in the establishment. We get that money from the broadcaster but we don't get it from the restaurant user." (D 217-18)*

In point of fact, however, the "policing" of 3M tapes was relatively easy to achieve. 3M offered to give publishers a list of the names and addresses of each establishment which, after expiration of the three-year term of license, did not renew its license with 3M (E 881; Chiantia Tr. 3007-11). Once those establishments were pinpointed, it would have been a simple matter to have a witness verify that a 3M tape was being played, and to sue for 700 in-

*In *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151 (1975), this Court noted that ASCAP has been unable to obtain licenses from most such establishments:

> "One has only to consider the countless business establishments in this country with radio or television sets on their premises—bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins—to realize the total futility of any even-handed effort on the part of copyright holders to license even a substantial percentage of them." *Id.* at 162.

fringements (at the then statutory minimum rate of $10 per performance, the recovery would be $7,000 plus attorneys' fees). The news of a few such suits would have quickly deterred other unauthorized uses. And, as ASCAP Board member, Salvatore Chiantia, testified, it "is one of the functions of ASCAP to detect and forestall and terminate . . . unauthorized uses" (D 295), and there was no reason, in terms of that function "why an unauthorized use of a 3M tape by a commercial establishment is any different from any other unauthorized use of ASCAP music by a commercial establishment" (D 296).

b. The Big Three.

3M's approach to the Robbins, Feist and Miller group (better known as "the Big Three") was rejected before 3M could even offer a guaranty. (It is, however, a fair inference that the parties understood that the amount involved would be substantial; the Big Three is the largest ASCAP publishing company in the country in number of songs in the ASCAP Index of Performed Works, second largest in terms of ASCAP distributions, and considerably larger than publishers to which 3M was offering guaranties of $30,000 or more a year.) [PX's 94, 429; Arrow Tr. 1400-03]

Arnold Maxin, General Manager of the Big Three and a Board member of ASCAP, first indicated that he wanted to learn more about the project (not from 3M; obviously, from representatives of ASCAP or other publishers). Shortly thereafter, Maxin informed Arrow that the Big Three was not prepared to "enter into this kind of agreement" because it would be "disloyal" to ASCAP to deal

directly with 3M for performance rights. [Arrow Tr. 1401-03]

The district court found that the Big Three's "reluctance to deal appears to have been motivated from a sense of devotion to ASCAP" (Pet. App. 99a). The word "reluctance" is off target in the light of the facts; but the main problem with respect to that finding is that, in view of the court's ultimate conclusions regarding the incident, it was not given any weight.

c. Paramount/Famous.

3M first approached Paramount/Famous Music Corp. on October 29, 1964. The negotiations were conducted on behalf of that company by Arthur Israel, President, Sid Herman, Vice President, and E. Compton Timberlake, inside counsel. [Arrow Tr. 1378-80; Herman D 627, 629-31, 633-34]

In the course of the negotiations, Arrow wrote to Israel, apparently in response to Israel's expressed preference that 3M deal with ASCAP, comparing Paramount's financial position on that alternative with the terms offered it on a direct licensing basis:

> "This will confirm our conversation of this morning in regard to the comparison of the net return to Paramount dealing directly with 3M as against through ASCAP.
>
> "You will find the *highest* annual rate per location on an ASCAP license through a wholesale distributor such as a 3M dealer is $30.00. ASCAP has already offered us a rate of $18.00 per year for

> offices and factories. However, for the sake of this comparison and how Paramount comes out, we will deliberately use the $30.00 per year rate or $90.00 for three years. We will also assume, for the moment, that ASCAP will have *no overhead* whatsoever in collecting these performance fees. Thus, we have made the picture look as bad as we possibly can for this new 3M proposal—the *highest* rate and *no* overhead for ASCAP.
>
> ". . . .
>
> "As it happens, since all of our present music was procured with no thought of whom the publisher may be but only if the music was suitable for our purpose, there are only seven selections controlled by Paramount/Famous. This is exactly 1/100th of the 700 total selections. Thus, even at the highest rate of $90.00 and no overhead expense for ASCAP, you would be entitled to exactly 90¢ plus 14¢ mechanicals or a total of $1.04 for that tape for three years use.
>
> "We have guaranteed you a minimum of 100 selections out of 700 at a rate of 5¢ for three years for both performance and mechanicals or a total of $5.00 for the same tape.
>
> "Actually, if a more realistic average ASCAP rate were used, instead of the top rate, and if the realistic overhead factor was figured in, you would probably receive more like 60¢ instead of $1.04.

"I believe this will clarify our proposal for you in such a way that you can easily show the very considerable advantage to you of dealing directly with 3M.

"The key to all of this, of course, is the fact that we will be restricting our 700 selections to a very small group of publishers and thus your participation is 100 selections instead of seven." (E 872-73) (Emphasis in the original.)

In short, 3M was offering Paramount/Famous more than 5 times what it would have expected to receive if 3M had licensed from ASCAP. The guaranty alone of 100 songs would have generated revenues that were approximately 120% Paramount/Famous' wired music distributions in 1967. [PX's 418, 459-C]

Despite the unmistakable superiority of the 3M offer, Mr. Israel, instead of accepting those terms, held "some discussions" with "either representatives or directors of ASCAP" and advised 3M "to go back and have another try at entering into an agreement with ASCAP" because he thought, on the basis of those discussions, that "the situation should be a little easier for 3M from that point forward" (Arrow Tr. 1387).

Shortly thereafter, Timberlake notified Arrow that "in his company's view [3M] ought to go back and try to reopen negotiations with ASCAP" (Arrow Tr. 1388). As a practical matter, that meant, as Mr. Herman testified,

"Q. . . . . 3M came in with an offer of essentially a guarantee of $75,000, and if they met their

projection of 1000 tapes per month, that would have been $150,000. Isn't it a fact that it would have cost Famous very little to enter into this transaction?

"A I don't think it would cost them anything to enter into it.

"Q It was just $150,000 gravy?

"A $150,000 down the drain, that's right."

(Herman D 637-38)

And the company was prepared to throw this money away, for Timberlake finally advised Arrow that the company might damage its "strong position with ASCAP", in doing "something which would be new and which Mr. Timberlake felt might be contrary to ASCAP's best interests" (Arrow Tr. 1390-91).

According to the district court, Paramount/Famous rejected that money because of the "policing" problem (Pet. App. 98a). That explanation, nowhere evident in any of the contemporaneous documents, was given by Mr. Herman at his deposition in this case (which was one of the last depositions taken on the 3M incident and at a time that the purpose of this discovery was well known). That it was self-serving is not a factor mentioned by the court. That there were other reasons apparent on the record was likewise not alluded to by the court.

d. Bregman Vocco.

Jack Bregman, President of Bregman Vocco & Conn, advised Arrow that "it was wrong for 3M to obtain or attempt to obtain licenses to perform music directly from music publishers" and that "his company was not prepared to issue such licenses" (Arrow Tr. 1408).

In discussing the situation with Salvatore Chiantia, President of MCA Music, Inc., Bregman "got very emotional about it and said it was a mistake"—"a mistake to leave ASCAP and license on our own"—"a mistake to license individually" (Chiantia Tr. 3024; Chiantia D 308-09). Indeed, Bregman wanted to know "where was it going to stop, if you license this individually, you have to license everything else individually" (Chiantia Tr. 3024; Chiantia D 309).

Bregman Vocco was the only other publisher whose "reluctance" to deal was attributed by the court to "devotion" to ASCAP (Pet. App. 99a).

e. Berlin.

For the purpose of interesting the Irving Berlin Music Corp. in the M-700 project, Arrow approached Theodore Jackson, a New York lawyer who represented Mr. Berlin, Jackson indicated to Arrow that he would discuss the matter with Mr. Berlin and eventually he informed Arrow "that Mr. Berlin had said that he was not interested in entering into a license agreement with 3M" (Tr. 1409) because the company was "not interested in licensing performing rights except through ASCAP" (Tr. 1410-11). [Arrow Tr. 1408-11]

The district court attributed Berlin's rejection of the 3M proposal to

> "reasons which are not clear. It appears to have been reluctant to license except through ASCAP, largely because 3M proposed to use too small a number of Berlin songs to make a different decision worthwhile. . . ." Pet. App. 98a-99a

The explanation adopted by the court—"too small a number of Berlin songs"—was what Arrow testified he was given by Jackson *in addition to* the "except through ASCAP" explanation. The differences are that the "except through ASCAP" explanation constituted an admission and, in the light of the new and substantial source of income then being offered by 3M for even a few compositions, is more credible than the adopted explanation. The district court took neither difference into account.

f. Frank Music

3M approached Frank Music Corp. on October 28, 1964. That company (whose catalog consisted principally of the music of Frank Loesser) was a client of Arrow's and he thought that the 3M proposal was a program in which Frank should be interested, for, among other reasons, "the company could use the money" (Arrow Tr. 1535). On December 23, 1964, Arrow set forth his views in writing to Milton Kramer, the General Manager of the company. After stating again in considerable detail the reasons why 3M had been unable to negotiate an agreement with ASCAP, Arrow wrote:

> "The proposal made to Frank Music and its affiliates was a guarantee of 25 selections in the first tape. We would guarantee Frank and its affiliates $7,500.00 per year and expect that the total royalty payable to Frank and its affiliates would be $15,000.00 per year in the first year and that it would exceed that in subsequent years.
>
> "Leon Brettler of Shapiro-Bernstein has done some market research and determined that the 3M program will probably pay to publishers within five

years a total of $3-million per year, of which Frank would receive approximately 1/30th [*i.e.*, $100,000].

"You asked me at the time of our telephone conversation whether I would be embarrassed if Frank did not agree to sign a license with 3M. I told you that my embarrassment would be more acute if Frank did not sign and the program were a success and Frank were not included. My feelings remain the same. I can see no reason for Frank to be on the outside looking in at the publishers who agree to this program." (E 857)

[E 853; PX 429; 3M PX 44]

Despite the attractiveness of those financial terms and the blandishments of its own attorney, Frank rejected the proposal, Kramer writing Arrow on January 12, 1965:

> "In view of our repeatedly expressed position as stalwarts of ASCAP, and since we appear to be of relatively minor interest with respect to the total number of copyrights suitable, I think we would prefer not to go along with this proposition on the first tape." (E 859)

Arrow testified at trial that he considered that statement to be a form of "irony or sarcasm," as well as "being stated with a smile" (Arrow Tr. 1530). In contrast, Arrow testified on deposition that it was his impression that Frank "simply did not want to be considered a maverick" (D 69), but the district court erroneously excluded the deposition testimony (Tr. 1518-21).

The more important facts are that Frank Music rejected a windfall royalty of approximately $100,000 for

five years; that rejecting such "found" money was an extraordinary act of irrational business behavior which would be totally inexplicable apart from the judgment that its long-range self-interests were better served by keeping direct licensing out of the performance rights field; and that even Arrow, its own lawyer, ultimately conceded at least this much:

> "Q Did Mr. Kramer or did anybody else at Frank Music and by that I mean to include Mr. Loesser, state to you in words and substance that Frank Music believed that it should not go into this project on a direct licensing basis because they felt that performance rights should be handled by ASCAP?
>
> "A Mr. Kramer stated that he would prefer to see the performing rights of the company licensed through ASCAP under these circumstances, rather than enter into the agreement with 3M at that time." (Tr. 1527)

The district court attributed Frank Music's refusal of 3M's offer to the "problems of policing and the number of tapes to be used" (Pet. App. 99a). As to the policing ground, we refer to our comments regarding Chappell's refusal to deal. As to the "number of tapes" ground (by which the court presumably meant, the number of Frank Music compositions to be used on the tape), all that is necessary to consider is the $100,000 offered to Frank Music for an acceptance of the proposal and the $0 it received by rejecting it.

g. E. H. Morris.

Arrow approached Harry Gerson of the E. H. Morris Company in late 1964 or early 1965. Gerson indicated that he would have to check with E. H. Morris himself, and later advised Arrow that "insofar as E. H. Morris was concerned, it was a matter which they just would not entertain" (Arrow Tr. 1394).

Arrow did not recall the terms of any specific offer made to E. H. Morris although he testified that 3M regarded the Morris catalog as "approximately equal" to the MCA catalog (for which 3M had offered a guaranty of $30,000 a year) (Arrow Tr. 1396).

The district court found that E. H. Morris rejected the deal because Morris "had completely misunderstood the amount of money 3M was actually offering" (Pet. App. 98a). Since Mr. Morris is the President of one of the largest music publishing companies in the country, and a Board member of ASCAP and the NMPA; since Arrow, a sophisticated attorney, was trying his best to persuade publishers to deal; and since no other publisher had difficulty understanding the terms of the offer, that conclusion is questionable on its face. In fact, a fair reading of the Morris deposition indicates that Mr. Morris not only refused to deal with 3M but refused even to listen to the 3M proposal.

The question as to whether E. H. Morris rejected the 3M approach before or after receiving a specific offer gave Mr. Morris considerable problems on his deposition. For if there had been a specific offer, it would clearly not have been "pennies", and thus his rejection of the deal could not be explained on that ground; but if 3M had not even been given a chance to make a specific offer when Morris

summarily refused to deal, why hadn't Morris at least found out what 3M was prepared to offer before so peremptorily shutting the door?

At first, Mr. Morris indicated that there had been a specific offer:

> "Q Are you sure that the 3M representative had quoted specific terms to Mr. Gerson?
>
> "A I believe so. In memory, I would say that Mr. Gerson discussed it with me and our decision was not to proceed." (D 670)

Mr. Morris then sought to explain his rejection of the offer:

> "We didn't do any business because we didn't want to." (D 669)
>
> "Q As a result of that, the Edwin H. Morris Company did not receive any royalties from 3M on the 3M—in connection with the sale of the 3M tapes; is that right?
>
> "A That is right.
>
> "Q And you thought that situation was better than receiving some royalties from 3M?
>
> "A *The amount involved didn't interest us.*" (D 670) (Emphasis added.)
>
> "Q But you expected the offer would yield more money to your company than the expenses of the licensing?
>
> "A I don't follow that.
>
> "Q It would have been a profit making transaction had you entered into it?
>
> "A When you are dealing in *pennies,* that is not much of a profit." (D 671) (Emphasis added.)

Since the 3M proposal involved far more than "pennies" for every publisher approached, Mr. Morris, on further examination regarding this subject, began to move away from his earlier testimony that a specific offer had been made:

> "Q . . . . I want to know whether it's true that the sole reason you did not really consider granting any form of license to 3M, was because the amount of money involved was too small?
>
> ". . . .
>
> "A I would say the amount of money did not interest us. There was no offer of anything other than what was generally known in the industry to be very small monies.
>
> ". . . .
>
> "I would have to say there were no figures mentioned other than it was rumored it was a small deal. . . ." (D 691-92)

That new position—that there never was a specific 3M offer, after all—obviously led to examination as to why Mr. Morris rejected the approach without attempting to learn whether the deal involved "pennies" or substantial amounts:

> "Q Did you suggest to Gerson he ought to get some specific figures from 3M?
>
> "A No.
>
> ". . . .
>
> "Q Weren't you curious to find out, though, how far 3M might go?
>
> "A My curiosity couldn't be aroused because I was not involved to the extent of knowing that much about it.

> ". . . .
>
> "Q Didn't [Mr. Gerson] express to you some curiosity in this?
>
> "A No." (D 692-93)

In other words, Mr. Morris testified that he was not sufficiently curious to learn what 3M might offer "because [he] was not involved to the extent of knowing that much about it"—despite the fact that it was Morris who made the decision to reject this approach out of hand.

Mr. Morris revealed that he did learn that it had been disclosed at an ASCAP Board meeting that Lou Levy (then Chiantia's superior officer at MCA) and Shapiro, Bernstein had acceded to the 3M proposal (D 672-73, 697); but still Mr. Morris made no effort to find out what 3M might offer his own company:

> "Q. And the fact that Lou Levy had granted a license to 3M, did not intrigue you at all in terms of the possible potential of a 3M deal?
>
> "A. I didn't know about the potential, but I knew that Levy and Shapiro both thought they were making a deal that was good for themselves, but I never heard any figures. . . ." (D 698)

We submit that it is inherently implausible that Mr. Morris in fact rejected this proposal on the basis of "rumors" that it involved merely "pennies" while at the same time refusing to learn what the specific terms of the offer might be. Indeed, on the M-1200 project, after 3M procured an ASCAP license, Mr. Morris's company signed a mechanical rights license with 3M for the grand sum of $5 a year, per composition (3M PX 39). In the light of Mr. Morris' other testimony revealing his extreme anti-

pathy toward direct licensing (*see* Addendum A, pp. 4-7, 11-13), it is far more likely that the actual reason for his refusal to deal with 3M was based precisely on that ground; and that the court's finding, based solely on the Morris deposition (not on demeanor, for Morris did not testify at trial) was plain error.

h. Warner Brothers.

The 3M negotiators met with representatives of Music Publishers Holding Corp. (the music publishing subsidiary of Warner Brothers) shortly after the meeting with Chappell, since they regarded the MPHC catalog to be the "second most important" (Arrow Tr. 1414). On October 29, 1964, Arrow particularized the 3M offer in a letter to George Lee, a MPHC executive:

> "3M further proposes to guarantee to M. P. H. C. that a minimum of Two Hundred (200) selections from your library will be included in the tape program. This will result in an amount payable to M. P. H. C. of Ten Dollars ($10.00) for each tape sold to 3M [i.e., approximately $120,000/yr.]. 3M will agree to guarantee to M. P. H. C. Fifty Thousand Dollars ($50,000.00) per year as a minimum royalty." (E 653-54)

Based on projected sales, MPHC could reasonably anticipate making a clear profit of $360,000 during the first three year term of that proposed agreement (pp. 4-5, *supra*).

The offer, however, could not be accepted, Lee explained to Arrow, because Herman Starr, the chief executive of MPHC, was in the hospital (Arrow Tr. 1414-16). While that was the only reason given to Arrow, the reaction of another MPHC executive, Victor Blau, who became

MPHC's designated member of the ASCAP Board, was evidenced by his statements to Leon Brettler following the Board meeting at which Shapiro, Bernstein's acceptance of the 3M deal had been announced:

> "A ... Mr. Blau said, 'Boy, I hope you fellows know what you are doing here. This thing doesn't make any sense to me at all and you are setting precedents here on rates and so forth. You 'young Turks' —I am not sure that 'young Turks' was the quotation but that was the implication—'you young fellows go into these things slap-dash and you better be careful because a lot is riding on what publishers do and how they do it.'" (Brettler D 246-47)

And it is clear that Blau made this statement after Starr died in 1965, since Blau did not become an ASCAP director until two weeks after Starr's death (PX 401).

The sole ground to which the district court ascribed the inability of 3M to reach agreement with MPHC was that Starr was "ill, and died during the course of negotiations" (Pet. App. 98a). That finding elides the facts and is clearly erroneous on that score.

To show that, we need not question the fact that Lee and Blau would not accept the 3M windfall without Starr's approval; since there can be no doubt as to the nature of the issue on which Mr. Starr had to pass. Surely, that issue did not involve the financial attractiveness of the proposal—which was the equivalent of 3M's handing to MPHC a check for one-third of a million dollars, cost free, with no strings attached. The only conceivable matter of sufficient importance to prevent the acceptance of this money absent that approval was whether MPHC was prepared to deal outside of the ASCAP consortium. Blau's statement to

Brettler indicated that, even after Starr had died and when the success or failure of this modest bypass was still at issue, MPHC was not prepared so to deal.

i. TRO.

At The Richmond Organization ("TRO"), the 3M negotiators met principally with Al Brackman, and the chief executive, Howard S. Richmond, who were advised by inside counsel, Alan L. Shulman. On the first approach, 3M indicated an interest in using 51 TRO compositions. Although the precise number ultimately involved in the 3M offer is not clear, TRO recognized that "there would be dozens of titles involved" and "[e]ventually [3M] said it may be hundreds of titles involved" (Brackman D 82). Based on even one dozen selections, the 3M offer would have generated for TRO revenues substantially in excess of its entire wired music distributions. Based on a selection of 50 compositions, the offer amounted to a guaranty of three times those distributions with a realistic expectation of revenues six times those distributions. [PX's 418, 459 B; 3M PX's 158-59; Arrow Tr. 1419-20; Shulman Tr. 3106-12; Brackman D 74, 78]

On July 15, 1965, Shulman wrote Arrow stating,

> "After giving serious consideration to the proposal for 3M usage of our compositions, we have decided that as a matter of policy we would like to pass this one up." (E 861)

The negotiations nevertheless continued, but, on November 19, 1965, Richmond advised Shulman,

> "Suggest we have a brief discussion between Al Brackman, yourself, and myself so that we can put Harold Orenstein [Arrow's partner] on notice with a friendly but firm letter, *so that nothing goes ahead until there's an industry decision.*" (E 880) (Emphasis added.)

Apart from the so-called "policing problem" the district court below attributed TRO's refusal to deal to the purported fact it was not a financially attractive proposition (Pet. App. 99a). The only basis for that finding could have been the testimony of Mr. Shulman; and his explanation of why the deal was unattractive does not withstand analysis, let alone counter the evidence reviewed above.

Mr. Shulman said that he had done "some arithmetic" and calculated that with 12 TRO songs on a 3M tape it amounted to only ½¢ a performance (Tr. 3094-95). One-half cent a performance, however, represents a princely sum in relation to the amounts paid by the wired music industry on a per-performance basis (or for that matter, in relation to any per-performance calculation of the many commercial uses made of phonograph records)—but those facts were not part of Mr. Shulman's "arithmetic".

Moreover, it is hardly likely that Mr. Shulman's computations formed the basis for Mr. Richmond's conclusion "that nothing goes ahead until there's an industry decision" (E 880). A month after that conclusion was reached—and at least eight months after the negotiations with 3M had commenced—Richmond learned that 3M had been able to put together 700 songs without his assistance and began to have second thoughts about throwing money away (*see* AX 185).

Mr. Brackman (who, unlike Mr. Shulman, was directly involved in the negotiations (Arrow Tr. 1419-20)), also had considerable difficulty explaining the "matter of policy" referred to in Shulman's letter regarding the

3M deal (E 861). He was quite adamant that the "matter of policy" involved was that the 3M proposal

> "required our collecting the writer's share of performances and accounting and paying for that share, which is a matter of principle with us in that we wouldn't have done that." (D 74)

TRO, however, regularly collects, accounts for and pays to writers their share of mechanical rights royalties, movie rights royalties and television synchronization rights royalties (Brackman D 79-82); and Mr. Brackman was unable to explain the "principle" guiding TRO's disinclination to do the same with respect to prospective 3M royalties (Brackman D 79-82, 95).

With respect to TRO and several other publishers, the court below relied heavily (to discount their initial refusals to deal) on the fact that they did deal on the second series of 3M tapes. Those transactions were significant to the court, since its sole focus on the evidence was whether it showed that publishers "would deal" or boycott. Even on that score there is a compelling difference, ignored by the court, between the incentive of a publisher to deal on a user's initial bypass attempt, and the incentive to deal after the user has conclusively demonstrated an ability to bypass. But on the issues to which the evidence actually applies—the level of publisher and writer antipathy to direct licensing by a network, and the premiums that would have to be paid to overcome it—3M's experience on the first series is dispositive, particularly in the light of all the other differences that marked the 3M bypass as trivial in comparison to what would be entailed in a network attempt.

4. The Publishers Who Dealt with 3M.

a. Shapiro, Bernstein.

The two most significant publishers which dealt with 3M were Shapiro, Bernstein and MCA Music, Inc. [PX 94; 3M PX's 50-52]

3M offered Shapiro, Bernstein a guaranty of $30,000 a year which was almost twice its wired music distributions. In point of fact, Shapiro, Bernstein anticipated receiving on this background music project between $200,000 and $500,000 (the latter figure being considerably more than that company receives in ASCAP distributions in respect of three years' worth of CBS uses of its music). [PX's 94, 418, 459-G; 3M PX 50; Chiantia D 312]

Even so, Mr. Brettler (Shapiro, Bernstein's Executive Vice President) "wrestled with this for a week or ten days" (Brettler D 236) because he was afraid that he "might set some precedents that I will be sorry about" (D 235):

> "Q Precedents for what? That is, that you might be sorry about.
>
> "A We described the benefits of joining ASCAP. If every ASCAP member licensed every use directly and ASCAP dissolved because everybody was flying off in a million different directions and ASCAP had nothing to license, you bet I would be sorry about it, and so would every member in view of my testimony." (*Ibid.*)

For that reason, Brettler preferred that 3M license through ASCAP but, unlike nine of his major publishing colleagues, Brettler was moved by the unlikelihood of 3M's being able to deal with ASCAP, and the money involved was more

than he could turn down. At the meeting he had on that subject with Bernard Korman of ASCAP, he said:

> "Bernie, I have a difficult decision to make but unless ASCAP can close this thing fairly soon I don't think Arrow is kidding around, I think he has a group of publishers lined up where he can scrounge out here and there 700 songs that are more than suitable for background music." (Brettler D 219)

For the contribution that Mr. Brettler made toward enabling 3M to compile its tape recordings from compositions that were not merely "scrounged out," and thus toward preserving this new source of income for publishers generally, Mr. Brettler was greeted with the antagonism of the ASCAP Board. After Mr. Finkelstein announced at the next Board meeting that the Shapiro, Bernstein/3M agreement had "come to his attention," "some cannonballs were coming my way," said Brettler, "and I sensed it wasn't the '1812 Overture'" (D 229, 231). (Brettler later allowed that "cannonballs" may have been an exaggeration; it was, he said, more like "spears and harpoons" (D 233).) "But let's face it," said Brettler, "this did come as a jolt" (D 231). The reaction was "intemperate"; "everybody was talking at the same time"; "15 people trying to speak at once"; he was accused in substance of having done something that "was not in the best interests of ASCAP"; and they demanded to know whether he thought "[the ASCAP] legal department wasn't functioning"; "Shouldn't you be more patient?"; "Why did you do it?" (D 231-32, 240).

"Life is simpler," concluded Brettler, "if you don't have to go through those kinds of afternoons" (D 250).

After Stanley Adams, ASCAP's President, "had the

meeting quieted down" and "got [it] in control" (D 231-32), Brettler attempted to justify his act on the following prophetic ground:

> ". . . I said, 'I would like to explain it in our viewpoint,' and I gave pretty much the explanation that I just gave you, that I saw this as an experimental thing, that if it happened on the scale that 3M expected there were going to be more tapes, *3M would have to go back to ASCAP*, and possibly it was a fortunate thing for us to do this, because if the venture flopped, nothing ventured, nothing gained; but if the venture succeeded and this became the new modus operandi of background music, *it would come back to ASCAP anyway*. And anyway, it's done." (D 232) (Emphasis added.)

Brettler made it clear, however, that neither he nor, in his judgment, the other publishers which had accepted the 3M premiums would be well advised to deal directly with a television network:

> "I don't think it is comparable at all to talk about what we did here with a very limited use involving only 700 songs, only for background, at an experimental rate, for an experimental use. I don't think the magnitude of that decision—and I know how long it took me to come to that conclusion; I wrestled with this for a week or ten days. . . .
>
> "Q Do you believe that a goodly number of ASCAP publisher members would have the feeling right off the bat that they should not license a television network under those circumstances?

"A Well, I think I indicated in my testimony all along here that I personally have the feeling that direct licensing of television networks would be—I think I used the word—self-annihilation as an industry. I think what we are talking about in licensing television networks and what we are talking about in what we did in licensing 700 songs to 3M on a limited. experimental basis . . . .

"Q You think it is night and day?

"A No, that is only 12 hours apart. I think it is 360 degrees. I think it is more. I think it is grains of sand compared to watermelons." (D 236-37)

Moreover, even after 3M completed its first series of tapes, Brettler indicated to Arrow "that he preferred not to be identified again as a member of the group which had licensed 3M" because he had been regarded by his peers "as a bad boy or a bad actor in connection with this entire program" (Arrow Tr. 1495). Thus, Brettler (and other publishers who dealt on the first series) urged that a luncheon to which they were invited by 3M not be attended by the press. [Arrow Tr. 1494-95]

b. MCA Music

The offer made by 3M to MCA Music, Inc. was a guaranty of $30,000 a year, with an additional $15,000 for the first year. Those figures substantially exceeded MCA's wired music distributions; and MCA, like Shapiro, Bernstein, actually anticipated receiving as much as $500,000 on this project. [PX's 418, 459E; 3M PX's 51-52; Chiantia D 312]

The negotiations spanned the better part of five months. Arrow had as many as 50 meetings or telephone conversations with Chiantia who, along with his immediate superiors, Lou Levy and Berle Adams, evinced considerable misgivings about going along. [Arrow Tr. 1361, 1365-67; Chiantia Tr. 2980, 3014-19]

Chiantia first checked with Korman to determine whether ASCAP might still license 3M—this, despite the fact that MCA could not possibly expect to earn anywhere near the amounts in an ASCAP deal that it had been offered on a direct-licensing basis. Levy persistently "clung to the hope that ASCAP would come to some arrangement with 3M," and "he preferred that" (Chiantia Tr. 3017-18). His position was: "I think ASCAP is going to make a deal. Why don't we hold off and see what happens?" (Chiantia D 299). Similarly, Adams advised, "if it is possible that ASCAP could license, I prefer that they do it" (D 301). At trial, Chiantia testified to the same point of view:

"Q You thought it was in the best interests of the music publishing industry that performing rights be licensed through the Societies, true?

"A I think that is true as a general matter, yes.

"Q And that was true in this 3M situation?

"A It is true in any situation." (Tr. 2991-92)

Although Chiantia was persuaded that there would be no ASCAP-3M agreement, and consequently executed the proffered contract, Levy apparently disagreed and gave a different version of the facts to the ASCAP Board:

"Mr. Chiantia was in an embarrassing position for another reason. His associate Mr. Levy, had indicated . . . that Leeds wasn't going to do this when in fact Leeds had made the commitment. . . ." (Brettler D 241)

Thus, according to Arrow, Chiantia "called me and asked me to meet with him and Mr. Adams with respect to an incident which I was told had occurred at ASCAP" (Tr. 1364). At that meeting, Arrow related,

> "Mr. Chiantia told me that his immediate supervisor, Mr. Levy, had had a discussion at ASCAP with respect to the 3M license and that Mr. Levy had instructed Mr. Chiantia to renounce the license or to withdraw and Mr. Chiantia thought that the matter was of sufficient importance to involve Mr. Adams, who was apparently the man who had been put in charge of both Mr. Levy and Mr. Chiantia by the acquiring company.
>
> "I was asked to explain the situation to Mr. Adams and I did and I think I told Mr. Chiantia at that time that as far as 3M was concerned and certainly as far as I was concerned on a personal basis if the existence of the contract was in any way embarrassing or if Mr. Chiantia thought he had overstepped his authority in dealing with 3M, we were ready to hand him back the signed piece of paper." (Tr. 1365)

[Arrow Tr. 1352; Chiantia Tr. 2989-90, 3019; Chiantia D 294, 304-05]

In short, the 3M offer to confer as much as $500,000 on MCA, on a cost-free, risk-free basis, required numerous discussions over the course of five months of negotiations, a meeting at which the 3M representative had to offer to tear up an executed contract for fear of "embarrassing" the MCA executive who decided to accept this windfall. and a confrontation between two MCA executives, both of whom agreed in their preference that ASCAP do the licensing,

but one of whom persistently and unrealistically "clung to the hope" that that preferable course would eventuate. Moreover, when Chiantia learned in 1968 that ASCAP had transacted a license with 3M on the M-1200 series, thereby markedly diminishing MCA's prospective revenues on the project, his reaction was "bravo, well done" (Chiantia Tr. 3012-13).

At trial, Mr. Chiantia testified that there was "absolutely" no basis for his preference that ASCAP license 3M other than his "concern about policing" 3M customers after the initial three year term (Tr. 3012). Apart from the facts stated above in connection with the Chappell episode (pp. 13-15, *supra*) it is scarcely credible that this purported problem of policing, viewed particularly against the prospect of a windfall royalty of as much as $500,000, could itself have been a matter of sufficient concern to generate the sort of conflict which obviously occurred within the MCA organization regarding this deal. That Mr. Chiantia understands the more significant problem inherent in direct licensing was made evident in this section of his examination by the Court:

> "THE COURT: You mean that when any direct licensing of a major proportion takes effect, it has the inherent possibility that other people may also ask for direct licensing?
>
> "A I think that it reasonable to assume.
>
> "Q And this would be a matter of concern to you?
>
> "A Yes, it would be a matter of concern. But I wouldn't refuse to license." (Tr. 3028)

And while Mr. Chiantia persisted in his profession of willingness to negotiate direct licenses with CBS, his analysis

of the problems presented by such transactions casts considerable doubt on that naturally self-serving assertion and, at minimum, portends a period of negotiation infinitely longer than the five months spent with 3M:

> ". . . I would have to know how I could exist beyond that time having to license CBS directly, and I would have to know what other possibilities were involved, what other doors would be opened. Would I then start licensing roller skating rinks directly? Would I then start licensing nightclubs directly? Would I then start licensing Joe's Hot Dog Stand directly? Where would it end? I'd have to know all of that in front. . . ." (D 280)

c. Jewel Music.

A third publisher who dealt with 3M, Eugene Goodman of Jewel Music Publishing Company, Inc., flatly admitted that he would not deal directly, either with any category of user within the ASCAP domain or, if he had it to do over again, with 3M itself:

> "Q Do you believe that it's wrong for ASCAP members to compete with ASCAP for the licensing of performance rights?
>
> "A Yes.
>
> "Q Why?
>
> "A Because I think as individuals we have no strength.
>
> "Q Then you believe it's important as a publisher to combine with other publishers and have a common licensing agent?
>
> "A No doubt in my mind.
>
> "Q Do you believe that when individual publishers enter into direct licenses with users which bypasses ASCAP that that weakens the strength of ASCAP?
>
> "A No doubt.
>
> "Q Then if 3M had come to you in the first instance without ever having gone to ASCAP you would have suggested that they go to ASCAP?
>
> ". . . .
>
> "A If I knew then what I know now, the answer is yes.
>
> "Q What do you know now that you didn't know then?
>
> "A I know more about the publishing business than I knew then.
>
> "Q Do you believe that once ASCAP has undertaken to offer licenses to a category of users that the members should refrain from dealing with those users?
>
> ". . . .
>
> "A I do." (Goodman Tr. 1631-32)

At trial, Mr. Goodman attempted to recant that testimony (Tr. 1561-62, 1569-71, 1579-87). Despite his understanding that the ASCAP blanket licensing system protects publishers from "cut-throat" competition in performance rights, the explanation for his present willingness to license performance rights outside of that system was said to be based on the fact that, in the 11 months intervening between his deposition testimony and his trial testimony, publishers' price competition in non-ASCAP areas (*e.g.*, mechanicals) had become "cut-throat" (*ibid.*).

We submit that the illogic of that explanation serves only to reinforce the significance of Goodman's testimony on deposition. Mr. Goodman, as is true of other publishers,

plainly recognizes the desirability of preserving the present ASCAP system as a shield against just such "cut-throat" competition. Made to realize that his deposition testimony was singularly unhelpful toward achieving that objective in this case, Mr. Goodman attempted to change that testimony.

5. The AGAC Reaction.

The reaction of popular songwriters to the news that some publishers had licensed 3M directly was, if anything, even more pronounced than that of the nine major publishers which repulsed that transaction.

In early November 1965, a meeting of AGAC's West Coast Committee, attended by 17 Los Angeles based writers, considered the 3M problem. Harold Spina, West Coast Chairman, reported that the Committee had concluded as follows:

> "1. That AGAC is properly acting in behalf of its members in notifying the publishers that they are in violation of our contract re bulk licenses, etc., and that the publishers must request permission from the writers.
>
> "2. That the writers are to be advised by AGAC of the damaging results that affect the entire performing rights structure should they grant permission to the publishers." (E 459)

Spina further reported, however, that those steps were thought to be inadequate:

> "Rather than place the writer in a position to have to answer the publisher's request and possibly get into an embarrassing or personal beef, it was felt that a solid front could be presented by AGAC

> as follows: A form letter be sent along to be signed by the writers, returned to AGAC, and kept on file, containing essentially the fact that they will *not* grant permission to *any* of the publishers on any of their songs involved.
>
> "It was unanimously indicated here that they would pledge themselves to this cause and enlist most of the other important writers out here to do the same, whether a member of AGAC or not. And, if the same could be done by the boys in New York, that a big dent would be felt by the publishers, who would *not* be able to deliver to 3M a large proportion of their catalogues, and, by weakening the publishers' position, cause 3M to reconsider.
>
> "While we would not put them out of business (because of the pre-1937 songs plus PD's), nor can we stop *some* songwriters from making a deal, our weight of songs denied them might make 3M remove the performance portion of their agreements with publishers and force them to negotiate with ASCAP." (E 459-60) (Emphasis in original.)

On November 15, 1965, Burton Lane, President of AGAC, circulated, at the instance of the AGAC Council, a letter to publishers warning them that direct licensing without writer consent violated the AGAC contract and reminding them of their obligations, not only to writers, but to the ASCAP system:

> "A most disturbing element of this situation, in our view is that 3M is dealing, for performing licenses, directly with ASCAP publishers ignoring completely the writers individually and the performing rights society of which the writers are mem-

bers. (We refer to ASCAP publishers only, because BMI has entered into an agreement with 3M)." (E 851)

While writers in Los Angeles and New York continued to press for some sort of concerted action, and those proposals were discussed at length within the AGAC Council, Lane reported to the West Coast Committee on January 12, 1966,

> "It was pointed out by our attorney and several members of our Council, that the strong letter which we sent to publishers is as far as we can go without raising the question of whether we are conducting ourselves in a manner which might be in conflict with the law as stated in the case of Ring v. Spina, in the U. S. Circuit Court of Appeals. . . . This is not a case where someone is conducting illegal activity—3M is engaged in a legitimate business enterprise, even though we are much concerned with some of the possible consequences of the project. As to the publishers . . . they are not acting illegitimately in a sense which would legally warrant concerted action in order to combat flagrant illegality directly. . . ." (E 467)

Lane suggested, however, that

> "Individual writers, of course, are free to express their opinion to publishers, solely on a private and individual basis." (E 468)

This, however, did not satisfy the West Coast Committee. It took some solace from the report by Ned Washington, one of its members, that 3M's "future was

rather dim since they were having difficulty in negotiating for the big catalogues originally anticipated" (E 485). However, the Committee suggested "that AGAC explore the possibility of deterring 3M through the trusteeship held by some AGAC members of mechanicals" (*ibid.*).

Charges that the AGAC Council was not taking measures that were sufficiently deterrent prompted this riposte from Lane:

> "I want to take very great issue with reference to 'organization weaknesses of AGAC'. . . . Just what are these organizational weaknesses? . . ."
>
> ". . .
>
> "The matter of the 3M situation was previously brought up. *We did a very effective job* in this direction and the statements which we issued, we think, had *great effect in causing publishers to reconsider this question and refrain from participating.* . . . Anything else would have been illegal; 3M is a legitimate corporation engaged in a legitimate business. Our chief concern is that 3M's signing agreements with individual publishers concerning performing rights is inconsistent with the manner of doing business which writers prefer and publishers should prefer, that is, to receive performing royalties through performing rights societies, so far as that is legally possible." (E 481-82) (Emphasis added.)

Apart from warning publishers against direct licensing, AGAC's main role in the 3M incident was an attempt to bring 3M into the ASCAP fold. Its effort in that regard, however, was made more difficult by the ASCAP view that

AGAC itself had not done enough to prevent 3M's direct licensing to begin with.

Thus, on April 21, 1966, at the first meeting held between ASCAP and 3M under AGAC's auspices, Herman Finkelstein took the following extraordinary position, as reported by a letter written by Mr. Arrow on the following day:

> "Herman then amazed us all when he said he thought the [AGAC] letter ill-advised because it was too mild and should have been followed by a lawsuit. Everyone in the room was stunned. I told Herman that I thought he might want to repeat that to his publisher members. . . . Herman however pursued the point saying that if he were AGAC's counsel, he would have 'provoked' a law suit." (E 869)*

Mr. Finkelstein also refused, at that meeting, to grant 3M a license "on a per-item basis," insisting on the blanket arrangement, and warned 3M that "[u]ntil you get the show tunes, you will need ASCAP" (E 473). Major Broadway show tune catalogs were then owned by Chappell and Morris, and the major motion picture compositions by Warner Brothers, the Big Three and Paramount/

*For the General Counsel of ASCAP to advocate that anyone commence litigation against ASCAP's own publisher members because of their indulgence in the direct licensing of a user as relatively minor as 3M is a rather significant indication of the depth of feelings within the ASCAP organization about bypass attempts and some small index of the pressures that would be brought to bear on publisher members that were approached by any television network making any such attempt. Although the documents reporting his statements in that regard were in the record at the time Mr. Finkelstein was called by ASCAP, he was not examined by ASCAP attorneys regarding those statements.

Famous—all of whom, as noted above, declined to deal with 3M. [PX 429; Dean Tr. 1812]

The negotiations between 3M and ASCAP, renewed under AGAC's auspices, finally came apart in late 1967, primarily over ASCAP's refusal to license 3M on a per-cartridge or per-song basis. The deadlock was resolved by recognition on both sides that no agreement could be reached on the M-700 and that the parties should limit further negotiations to the new 3M background music project, the M-1200. [E 866; 3M PX's 85, 86; Arrow Tr. 1463-69,1479-80]

That project differed from the M-700 in three significant respects: each tape consisted of 1200 songs rather than only 700; the tapes and players were to be leased to users, rather than sold; and the project was designed to compete with the established background music services in that it was offered to the larger commercial installations. [Arrow Tr. 1344-2001]

On July 1, 1968, 3M and ASCAP concluded an agreement for the M-1200. With 3M's foray into direct licensing thus effectively quarantined, agitation against 3M ceased, and AGAC claimed credit for bringing 3M and ASCAP together. Indeed, Lane was delighted when 3M finally obtained an ASCAP license, even though he never knew the terms of that agreement, and, hence never had an opinion as to whether, from the writers' point of view, the terms reached by ASCAP were better or worse than those which had previously been obtained by the various publishers. [3M PX's 94-95; Lane Tr. 1104, 1109-10]

The district court's principal focus on (what it termed) "the AGAC ploy" was whether it proved that AGAC could exert sufficient pressure on publishers and writers to get them to refuse to deal directly with CBS—not whether it

demonstrated resistance itself—and its findings on this aspect of the 3M incident all reflect that erroneous standard.

Thus, the court indicated that AGAC would be of little effect because only "8% of the writer members of ASCAP and writer-affiliates of BMI are AGAC members" (Pet. App. 100a). Not mentioned is the fact that the 1200 AGAC writer members of ASCAP supply approximately 45% of the music used on CBS (measured by ASCAP credits). [PX 843; AX's 159, 287]

The court passed off the correspondence from AGAC's California group as emanating from a " 'radical' wing of AGAC which styled itself the West Coast Committee" and which was "rejected" by the AGAC Counsel in New York (Pet. App. 101a). The AGAC letterhead, however, listed the "West Coast Chairman" as an officer of the organization (E 1230), and the AGAC *Bulletin* reported on the election of West Coast chairman and the members of the West Coast Committee (E 655). As is evident from PX 123 (E 459), the members of that group comprised many of the most distinguished songwriters in the country (*e.g.*, Ned Washington, Johnny Mercer, Jimmy McHugh, Harold Adamson, Sammy Fain). Moreover, eight of those members were officers of AGAC and members of the AGAC Council during the period 1964-1970, and Mr. Washington was a writer member of the ASCAP Board (PX's 400, 460).*

It is also evident from the tone of Lane's own writings that the level of antagonism was sufficiently strong that the AGAC Council itself would have been quite happy to engage in more concerted action to prevent the direct licensing by 3M, if not precluded by law from so doing; and it

*It might also be noted that the 17 writer members who attended the meeting reported in PX 123 (E 459) have almost 5,000 compositions in the ASCAP Performed Works Index (PX 429).

is evident why. In PX 135 (E 482), Lane wrote that "our chief concern is that 3M's signing agreements with individual publishers concerning performing rights is inconsistent", not simply with the "manner of doing business which writers prefer" but also with the manner which *"publishers should prefer"—i.e.,* "to receive performing royalties through performing rights societies." The one major reason for that preference shared by publishers and writers alike is to prevent "the damaging results that affect the entire performing rights structure" (E 459)—*i.e.,* the onslaught of price competition. Mr. Lane's testimony on that subject was obviously guarded to the extent of denying any recollection of any "specific" discussion of that possibility, but he did admit this much:

> "Q Did you consider at all in your discussions at the Guild council whether direct licensing of 3M by publishers might not result in a scramble among publishers to get contracts with 3M and that that might lead to price cutting and competition?
>
> "A I can't say that we did discuss it or didn't, but certainly that kind of thing could exist and we were aware of it. . . .
>
> "Q Did you regard that as an undesirable possibility?
>
> "A Yes, we would have thought of it that way." (Tr. 1149)

Finally, the district court concluded that AGAC and its letter "clearly had no impact on 3M's efforts" (Pet. App. 101a). By "no impact" the court meant it did not lead to publishers' refusals to deal. Of course, AGAC's letter to publishers was sent after nine of them had already refused

to deal and it was thus material only to the second series. But it should be noted, in connection with the issue to which this evidence is actually pertinent, that the AGAC letter was the direct cause of the reconsideration of the 3M proposal by several publishers (E 461, 864, 879); Arrow testified that it was discussed with him by a number of other publishers (Tr. 1443-44); and, on reporting on the results of the letter, Lane wrote, as noted above,

> "We did a very effective job in this direction [the '3M situation'] and the statements which we issued, we think, had great effect in causing publishers to reconsider this question and refrain from participation." (E 482)

ADDENDUM C

The Shenandoah Incident

In October 1961, a group of television stations commenced a proceeding under the ASCAP consent decree, entitled *In the Matter of Shenandoah Valley Broadcasting Inc., et al.*, seeking licenses limited in coverage to locally originated programs. The ASCAP licenses issued to television stations already excluded, by operation of the decree, the television network programs broadcast by the stations. The effect of the *Shenandoah* application, had it been granted, would have been also to exclude programs made by independent packagers (and thus exclude the television station income generated by broadcasts of those programs from the ASCAP license royalty base). [Finkelstein Tr. 3755-56; *see United States* v. *ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 331 F. 2d 117, 121 (2d Cir.), *cert. denied*, 377 U. S. 997 (1964)]

The contention advanced by the stations in support of their application was that the packagers should directly license the music to be used on such programs, which would permit price competition to occur in an area from which it was foreclosed by the blanket license. As such, the proceeding was regarded by music publishers as a potential threat to the preservation of the blanket licensing system. [E 822 (para. 12); Finkelstein Tr. 3756-57; *compare* E 824 (para. 15) *and* Finkelstein D 607-09 *with* Finkelstein Tr. 3762-63]

(It is noteworthy that ASCAP opposed the broadcasters' application not only on the ground that the ASCAP consent decree failed to compel ASCAP to grant that sort of license, but also on the contention that it was then impracticable for the producers of these programs to fill their performance rights requirements by means of direct licensing. Many of the producers involved agreed with the ASCAP position. Whether or not adequate direct-licensing facilities

would have been installed absent a declaration that the blanket system was illegal, the significant point is that this application carried with it some possibility that direct-licensing and thus price competition would be injected into the market.) [Finkelstein Tr. 3757; E 692, 815]

Coincidentally, the proceeding was commenced within a few months of the time that the ASCAP member authorization-of-television-rights agreement was coming up for renewal. Accordingly, many ASCAP members, including Board members, indicated that, unless the stations withdrew their application for the form of license sought in that proceeding, the members would not authorize ASCAP to continue to license their music to television stations at all. It was only after Judge Ryan "instructed [ASCAP's General Counsel] to report to ASCAP that the Court expected ASCAP to deliver those rights to the broadcaster" (Finkelstein D 615), that such authorizations were forthcoming. [E 824 (para. 15); Finkelstein Tr. 3757-58, 3760-61; Finkelstein D 607-09]

At trial, Mr. Finkelstein denied that the members' initial refusal to grant the necessary consents was based on their opposition to the form of license sought by the stations; their concern, Mr. Finkelstein claimed, was solely with the license fees. Thus, on examination by the court:

> "THE COURT: . . . Mr. Finkelstein, was a substantial reason for the failure to secure the eighty per cent up to the time when Judge Ryan suggested that you should get that approval an unwillingness on the part of any substantial number of members to accede to the request of the television stations for the license indicated in Shenandoah?
>
> "A I heard no such observation by any member. The only observation I heard was those people

> who wouldn't sign, we want to see what kind of agreement you propose to come up with this time; how much money; they weren't thinking at all, so far as I know, *they weren't thinking of the kind of agreement but they were thinking very much of the kind of money* they would be getting if they deposited their rights with the society." (Tr. 3762-63) (Emphasis added.)

That testimony, however, was in sharp conflict with the contemporaneous, sworn statement which Mr. Finkelstein submitted in the *Shenandoah* proceeding itself:

> "As a result of Petitioner's unexpected demand for a license covering only a small portion of their local programs [*i.e.*, possibly permitting direct licensing for the rest], a number of ASCAP members delayed the execution of their authorizations of television rights for the 1962-66 period *because of their unwillingness to permit ASCAP to agree to license their catalogues on this basis.*" (E 824 (para. 15)) (Emphasis added.)

In short, the episode provides yet another illustration of ASCAP members' resistance to the prospect of direct licensing; and while the trial testimony of ASCAP's General Counsel attempted to obscure that fact, the inconsistency of the testimony with the contemporaneous affidavit served only to emphasize that the resistance revealed by the incident was sufficiently damaging to warrant that attempt.

ADDENDUM D

Defendants' Admissions and Stipulations Regarding the Present Impracticability of a Television Network Bypass of ASCAP and BMI

1. The Legal and Factual Context.

As discussed in the brief, CBS has maintained that the present barriers to a bypass are sufficient to preclude the attempt, whereas they are entirely cartel-created (music-in-the-can; the present lack of direct-licensing facilities for previously published music and the cartel-inspired disinclination to create them), and thus removable by decree, so that there is no inherent market-functioning disability to a competitive, direct-licensing system.

From defendants' standpoint, however, any attempt to justify the present price-fixing arrangement on market-functioning-necessity grounds was (and is) inconsistent with their bypass contention. Thus, defendants could not rationally assert both (a) that their present common-licensing-agency system was justified on necessity grounds because the market could not function on a direct-licensing basis, while at the same time contending (b) that the market would function so well on a direct-licensing basis that CBS could fill its requirements, without disadvantage, by bypassing the common-licensing agencies.

Until the trial, there was considerable question as to which of those two mutually exclusive contentions defendants would advance. They finally elected to defend on the latter ground; but by that time, they had made so many admissions regarding the present impracticability of a bypass that the contention should have been summarily rejected.

The district court below plainly erred in failing to consider those admissions (which satisfied even the extreme

and erroneous legal standard by which the court tested the putative bypass possibility) and in misconstruing a stipulation of fact that the admissions had prompted. The court of appeals did not refer to either.

2. Direct Admissions.

At the very outset of the suit, BMI admitted the present impracticability of a bypass in its answer to the complaint (JA 68-69, (par. 5)). On July 10, 1970, during the oral argument on BMI's motion for a preliminary injunction, BMI counsel reaffirmed that "seeking direct licenses" from BMI publishers for the purpose of "bypassing the BMI licensing arrangement" "really isn't practical" (JA 159).*

Prior to the institution of this suit, ASCAP representatives frequently conceded the same point in articles, affidavits, testimony in other proceedings, and official literature of the organization (E 411-12 (paras. 12, 14), 444-45 (para. 10), 708 (para. 12); Marks Tr. 2709-10; Finkelstein Tr. 3679-81, 3700-02, 3709-10; Finkelstein D 555). In fact, so immutable was this proposition deemed to be, that Mr. Finkelstein conceded, in testimony before a special subcommittee of the Judiciary Committee of the House of Representatives, that:

> "An organization like ASCAP or BMI or anybody else should not be permitted to combine in great numbers unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the nondramatic performing rights because in all other fields the writer and the publisher can shift for themselves, and so can the user." (Tr. 3679)

*That position is also consistent with the BMI brochure "You and the Music You Use" (E 646) which maintains that dealing with BMI makes it "unnecessary for you [the user] to engage in the *impossible* time- and money-consuming effort of trying to deal directly with the American and foreign composers and publishers whose music you use." (E 649) (Emphasis added.)

Thus, on deposition in this case, Mr. Finkelstein testified:

> "Q Let me ask you this. Is it true that large-scale users of copyrighted musical works would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?
> "A I believe they would.
> "Q Is CTN a large-scale user?
> "A Oh, yes." (D 548-49)

As to the competitive injury that plaintiff would sustain in attempting to license directly:

> "Q Is it also true that the failure of the television network to obtain an ASCAP license would constitute a restriction that would impair the quality of its programs?
> "A Yes, and I would say that today the same thing would apply to the BMI license.
> "Q Is it true that the impairment of the quality of a television network's programs will adversely affect the network's competitive position vis-a-vis other networks?
> ". . . .
> "A Well, I suppose if the quality of a network's program is impaired, that it isn't going to be in as

> good a competitive position with other networks as if its quality is not impaired as related to the other network, that is if the other network's programs don't suffer the same impairment, then it would follow that what you say is correct." (D 577-82)

And, as to the ultimate effect on plaintiff (indeed, in Mr. Finkelstein's view, on the entire system of broadcasting in this country if other networks now joined in attempting to bypass ASCAP):

> "Q If CTN had no ASCAP license at all and persisted in not having an ASCAP license, it, too, in the long run would be injured?
>
> "A I think so. I think so. And if they conspired with NBC not to do it, I think they would both be injured, yes, in the long run. But they would save some immediate dollars. But ultimately it would destroy the American broadcasting system.
>
> "Q How about CTN? Would it destroy CTN?
>
> "A Oh, if the American broadcasting system is destroyed, I suppose CTN would fall with it." (D 575-76)

At trial, Mr. Finkelstein was given every opportunity to rationalize, minimize or otherwise walk away from those points. (Not by ASCAP's counsel, however, for they did not go near any of those statements on direct or redirect, but on cross-examination and examination by the court.) Although Mr. Finkelstein did disclaim a present belief at trial in other points to which he testified on deposition in 1971, he not only refrained from suggesting any reasons why the statements quoted above have become erroneous in

two years, he expressly ratified that testimony (*e.g.*, "it is true"—Tr. 3718*).

Moreover, Mr. Finkelstein's admissions of substantively identical points were expressed repeatedly in affidavits he submitted in opposition to NBC's consent decree application for a limited repertory (or "nucleus") license covering 2,217 songs. For example, in an affidavit sworn to June 25, 1970, Mr. Finkelstein maintained that NBC's need to apply to the court to set fees for the many compositions "not included in the list of 2,217 . . . would impose an impractical burden of continuous applications on both the court and ASCAP" (E 396-97, para. 12). At trial, Mr. Finkelstein not only ratified that statement, but made it clear that the "impractical burden" which would be imposed on the court would be the result of NBC's present inability to directly license those additional requirements:

> "THE WITNESS: . . . . I said that would impose a great burden on the Court and I didn't think that would be workable. I don't think *now* that would be workable . . . .
>
> ". . . . .

---

*As is also true of every statement made by Mr. Finkelstein in testimony, affidavits or other writings, as to which he was examined on deposition or at trial, his ratification of this testimony was conditioned on taking the statements "in their context" (*ibid.; see also, e.g.*, Tr. 3780-81). Moreover, Mr. Finkelstein made a number of assertions in his testimony which are arguably inconsistent with the concessions noted above. Clearly, however, the significant portions of the examination of an adverse party consist of the admissions to which he is drawn, not the assertions consistent with his own self-interest. Even more importantly here, despite the varied testimony which Mr. Finkelstein has made in this case, one may search in vain throughout the many hundreds of pages of examination, on deposition or trial, to find any "context" which alters the plain meaning of the statements quoted above.

"THE COURT: . . . Mr. Finkelstein, was it implied in your belief that a substantial burden would be imposed on the Court that NBC would on many occasions be unable to bring about a direct license of the songs not included in the 2217?

"THE WITNESS: I had in mind that the Court would just reject—that the antitrust laws weren't designed to impose that kind of burden on the Court and it just wouldn't work.

"THE COURT: However many there were?

"THE WITNESS: However many there were and *there would have to be many* because I think that I could envisage—I think I am in a position to project the number of occasions based on past, based on problems that I am aware of. I think I could anticipate that there would be far more applications than the—if this was—if you are going to try to make it work, *than the Court could possibly be confronted with* considering the limited time with cases of this kind." (Tr. 3737-39) (Emphasis added.)

On the same grounds, Mr. Finkelstein asserted in an affidavit sworn to July 10, 1970 (E 405), that "the license NBC requests would be unworkable because it would require that NBC dictate the compositions which might be performed regardless of the performers' desires" (E 411 (para. 12)) and "even to censor compositions already performed on prerecorded broadcasts" (E 412 (par. 14)).

Obviously, the necessity to "dictate" and "censor" would only arise because of the inability of NBC and its program producers to directly license the music they desired to use which did not fall within the "nucleus" license. And, Mr. Finkelstein's admission that that problem was sufficiently large so as to render "unworkable" a form of license covering 2,217 compositions, plus background music libraries, establishes, *a fortiori*, the disadvantage that would now be incurred by a network if it attempted a bypass without any ASCAP license at all.

Precisely that point was brought out on Mr. Finkelstein's deposition in this case:

"Q If CTN had no license at all from ASCAP would it be in the position of having to dictate to the producers of its programs which compositions may be performed and even to censor compositions already performed on prerecorded broadcasts?

"A No. My answer may be due to the form of the question.

"Q You don't like the words 'would have to'?

"A That's right, I don't.

"Q Would they do it?

"A Yes.

"Q Would they have any realistic alternative to doing it, other than, I am excluding, obtaining a license from ASCAP?

"A Having once decided that they would do business that way, everything else would follow.

"Q They would have no realistic alternatives?

"A I would say that they would have made the decision in the first instance and, having made that decision, all these other things follow.

"Q The dictation and the censorship?

"A That's right.

"Q The dictation and the censorship would apply to variety programs?

"A Oh, any program." (D 566-67)

And at trial, Mr. Finkelstein unequivocally ratified that testimony:

> "Q . . . . Is that testimony true, Mr. Finkelstein?
>
> "A I think so." (Tr. 3772)

Indeed, the BMI defendants represented to the district court after the first day of the Finkelstein deposition that the present impracticability of a bypass had already been so clearly established in this case by defendants' admissions that further examination of Mr. Finkelstein or others on the subject would be cumulative and should be foreclosed:

> "5. . . . CBS re-established this proposition early in the day (Finkelstein Deposition Transcript 46-47):
>
> " 'Q Let me ask you this. Is it true that large-scale users of copyrighted musical works would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?
>
> " 'A I believe they would.
>
> " 'Q **Is CTN a large-scale user?**
>
> " 'A Oh, yes.'
>
> "CBS then proceeded to elaborate on this conceded point, asking questions as to the geographical distribution of the ASCAP members (pp. 48-52), the size of the ASCAP repertory (pp. 52-61), the number of compositions added to the repertory each year (including questioning on the 1969 Annual Report **issued by the United States Register of Copyrights**) (pp. 61-67), as well as the following questions which are some of those which consumed the last 70 pages of testimony:
>
> "[Four pages of other Finkelstein admissions are omitted.]
>
> "6. Not once during the deposition did ASCAP attempt to curtail this line of questioning even

> though it had conceded CBS' proposition both in **its Answer and early in the deposition.**
>
> "7. We believe it is clear that if this Court does not fix an early trial and require CBS to confine its discovery to relevant matters and matters which are in dispute, this action could be drawn out indefinitely." (JA 171-76)

3. Stipulations.

On May 25, 1972, CBS and ASCAP entered into a stipulation of facts (E 1), the key language of which for present purposes is set forth in paragraphs 13 and 15. Paragraph 13 provides, *inter alia*:

> "There is a portion of the performance rights to ASCAP music appearing on CTN[*] programs as to which it would be impracticable for CTN or such producers to negotiate for licenses directly with the owners of the performance rights of said music." (E 6)

Paragraph 15 provides:

> "If CTN chose not to have an ASCAP license, the producers of CTN programs did not obtain such licenses, and NBC-TN and ABC-TN had such licenses, to the extent that CTN or the producers of CTN programs did not otherwise obtain the performance rights to the ASCAP music which they desired to use on CTN programming, CTN would be at a competitive disadvantage vis-a-vis NBC-TN and ABC-TN." (E 6)**

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*Defined in the stipulation as the CBS Television Network.

**CBS and BMI had earlier (October 15, 1971) executed a stipulation (E 386) which made any ultimate finding of fact on the bypass question as between CBS and ASCAP binding as between CBS and BMI (E 388-89 (para. 2)). By virtue of that stipulation the CBS-ASCAP stipulation became applicable to BMI—a point with which BMI has never disagreed.

As the product of negotiation, the stipulation is hardly a model of superior draftsmanship; but it was quite clearly misconstrued by the district court below. The court held that since

> "Paragraph 13 does not specify the 'portion' of the compositions in the ASCAP repertory as to which it would be 'impracticable' for CBS to license directly" Pet. App. 48a.

—then

> "Paragraph 13 does not indicate that ASCAP and BMI have admitted the unfeasibility of direct licensing . . . Pet. App. 48a-49a.

and that therefore

> "Paragraph 15 loses the dispositive force which CBS attributes to it." Pet. App. 49a

The district court's initial focus was on the wrong paragraph. The question is not whether Paragraph 13 establishes "the unfeasibility of direct licensing" before Paragraph 15 is read—it is whether Paragraph 15 establishes that proposition given the background facts defined in Paragraph 13.

In short, Paragraph 15 is clearly to the effect that CBS would now suffer a competitive disadvantage vis-a-vis NBC and ABC to *whatever* extent it could not fill its music requirements by direct licensing—and Paragraph 13 affirms that there is *some* extent to which that would happen.

Of course Paragraph 13 does not quantify or "specify" (as the district court noted) the portion of CBS's music requirements that are now unobtainable by direct licensing; but its obvious purport is that *some* portion of its requirements fall in that category—and the obvious result of Paragraph 15 (specifically its conclusion that the fact that

requirements were not fulfilled would result in competitive disadvantage) is to make such quantification unnecessary.*

Although we believe that reading of the stipulation to be the only sensible construction on the face of the language set forth, the facts relating to its execution and ASCAP's pre-trial reliance on it bear out that interpretation beyond peradventure.

The event triggering negotiations of the CBS-ASCAP stipulation was ASCAP's motion, made October 18, 1971, to stay CBS's discovery pending the district court's decision on ASCAP's motion for summary judgment or, alternatively, to limit pre-trial discovery. At that stage of the case, the only deposition taken had been of Herman Finkelstein,

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*It might also be noted that the last sentence of Paragraph 13 reserves to both parties the right to show "reasons" why a portion of CBS' music requirements is unobtainable in practice:

> "[Without limiting the parties' rights to adduce and offer additional proof with respect to any subject, both parties specifically reserve the right to adduce and offer proof regarding the reasons for such impracticability.]" (E 6)

And, at the time, that reservation was important to both sides.

As noted in our brief, one of the issues distilled from the denial of summary judgment was whether the market for the licensing of performance rights to television networks could function on a direct-licensing basis. Presumably, ASCAP retained some interest in taking the negative of that position. By the same token, it was important to CBS to reserve the right to establish that the "reasons" for the impracticability of the direct licensing noted in paragraph 13 were *not* attributable to any inherent inability of the market to function on a direct-licensing basis, but to artificial barriers removable by decree.

ASCAP subsequently contended that the reservation, permitting it to show "reasons" for the stipulated "impracticability," somehow permitted it to prove that the "impracticability," as well as the "competitive disadvantage" stipulated to flow from it (Para. 15 of the stipulation), were *de minimis*. While the district court ultimately agreed with ASCAP's interpretation of the stipulation, it did not predicate that view on the reservation contained in paragraph 13; and there is no conceivable "reason" which ASCAP can offer as an explanation for the phenomenon of the "impracticability" which would dislodge the stipulated fact that the phenomenon would occur (or which would cause it to be *de minimis*, which means legally nonexistent; *Blackstone, Commentaries*, p. 1063 (Chase ed. 1908)).

ASCAP's General Counsel, who had (as noted above) effectively admitted the present impracticability of a bypass attempt, so that logically the only defense left to the ASCAP defendants was market-functioning necessity.

In response to ASCAP's motion, CBS indicated in its supplemental memorandum of November 3, 1971, that it sought further discovery on the bypass question as well as other matters. ASCAP's reply memorandum of November 10, 1971 (consistent with BMI's affidavit discussed above), disputed the need for further such evidence, strongly implying that the contested issue of fact was not bypass disadvantage, but the ability of the market to function on a direct licensing basis:

> "It is not a matter of serious dispute that, if CBS, as a user of music in bulk, had to obtain individual licenses from ASCAP members to satisfy all of its needs for music, that would be a time-consuming, difficult and expensive procedure and might even in some cases for various reasons be impossible. That is precisely one reason why a licensing organization such as ASCAP exists and that is precisely why CBS wants it to continue to exist (even though the logical conclusion to be deduced from CBS's claims of antitrust violations is that ASCAP should be dismembered).
>
> "Why does CBS need discovery to learn what everybody already knows—some ASCAP music, to use CBS's characterization, is 'inaccessible' and some is 'accessible.'" (E 604)

Accordingly, ASCAP suggested that

> ". . . if CBS were to formulate an objective statement of the facts it seeks to prove at a trial, we respectfully submit that the parties could probably stipulate to most or all of the relevant facts." (E 605)

CBS responded on November 12, 1971, proposing procedures for a stipulation of fact process to be completed within the following month (E 825). In a letter of November 18, 1971, ASCAP accepted that proposal without time limits, but agreed to proceed "as expeditiously as possible" (E 829). The court, by letter dated November 18, 1971, approved the parties' attempt to stipulate facts and requested "that the exploration of the feasibility of such a stipulation not be held in abeyance pending my disposition of the motion for summary judgment."

The district court denied ASCAP's motion for summary judgment on January 20, 1972. While stressing that there remained to be tried the factual question of whether the market would function under CBS's proposed relief, the opinion, *noting the admissions of Mr. Finkelstein,* questioned the practicability of the bypass "option";

> "we are doubtful in any event of the practical value of the 'nonexclusive right' under the present system. We are inclined to agree with the court in Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322, 333 (1959). There Judge Weinfeld observed as to the argument that a user always has the 'option' to seek an individual license: 'The nonexclusive right allegedly retained by the plaintiffs [composers and authors] is more apparent than real.'" 337 F. Supp. 394, 401

After repeated court directions to ASCAP to respond to the CBS draft of proposed stipulations (which was submitted to ASCAP on December 8, 1971), and subse-

quent negotiations, the stipulation was finally signed on May 25, 1972.

Having stipulated bypass disadvantage, ASCAP sought to utilize the stipulation as a means of limiting further discovery. On August 25, 1972, CBS moved under Rule 37 to compel ASCAP to answer interrogatories and produce documents relating to, among other points, the reasons for bypass disadvantage (including the transactional problems inherent in the present absence of direct licensing facilities). ASCAP's memorandum of September 27, 1972, in opposition to that motion advanced the following contention:

> "The fact is—indeed, it has been stipulated—that
>
> "'There is a portion of the performance rights to ASCAP music appearing on [CBS] programs as to which it would be impracticable for [CBS] or producers [of CBS programs] to negotiate for licenses directly with the owners of the performance rights of said music.'
>
> "Thus, no one disputes that CBS would have problems if it had to negotiate for all of its performance rights directly. And no one disputes what the nature of the problems might be (people travel, people move, people sometimes will not answer their telephone, etc.).
>
> "In these circumstances, there simply is no good reason for extensive and burdensome document discovery which will then be used to prove the obvious." (JA 334)

In advance of trial, and in its pre-trial memorandum, CBS emphasized, and relied upon, the stipulated fact of bypass disadvantage. ASCAP's counter was that the stipulation left it free to prove that such disadvantage was *de minimis* (and, when CBS noted its disagreement, ASCAP unilaterally announced that the stipulation was at an end). [PX's 988-91; CBS Trial Memorandum, April 25, 1973, pp. 16-18; ASCAP Reply Memorandum, May 7, 1973, pp. 4-6]

On ASCAP's motion to dismiss the complaint at the close of plaintiff's case, CBS again stressed the significance of the stipulation; but ASCAP did not refer to it (Tr. 2379-82).

It was not until the fourth trial day of ASCAP's case (and the first day of the November 1973 session of the trial) that ASCAP requested to be relieved of the stipulation. The sole ground put forth for that relief was that ASCAP had "no intention" to stipulate that bypass disadvantage was any more than *de minimis*. [Tr. 2837-38]

Apart from the implausibility of that assertion and its insufficiency in law, ASCAP's denial of any intention to stipulate to actual, as distinguished from *de minimis*, bypass disadvantage is grievously at odds with the statements made by ASCAP in November 1971 to stay discovery and induce CBS into stipulation negotiations (pp. 12-13, *supra*), and in September 1972, to impose a limitation on CBS's document request (p. 14, *supra*). On both occasions, CBS was seeking information relating to the bypass point; and ASCAP was attempting to foreclose that discovery on the ground that the problems which CBS would encounter in a bypass were undisputed. Indeed, on that second occasion, ASCAP argued that such problems had been stipulated to exist. For ASCAP to have asserted at trial that it only meant to imply that those undisputed problems were *de minimis*, and that it stipulated merely to that effect, was a contention that should have been unworthy of judicial consideration—but represented the final conclusion of the district court.

ADDENDUM E

ADDENDUM E

The Per-Program Format of a Blanket License

As the court of appeals found, "the per-program license is simply another form of blanket license" (Pet. App. 6a).*

The user receives a license of exactly the same scope as that provided by the standard blanket arrangement: the right to use any, some or all of the music in the ASCAP pool. The difference between the two forms of license lies in the method of payment. Instead of paying a fee for the year, the user pays either ("at the option of ASCAP") a flat dollar fee or percentage of time income for each program using any ASCAP music.**

---

*The court of appeals further noted,

> "neither permits the licensee to pay only for those compositions which it actually uses, and the per program license should not be confused with a per use license."

"9. Under the per program license, once there is any use, the amount of use is irrelevant. It does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same.

The utility of the per program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming. In any case, we understand that all three networks and virtually all commercial television stations in the United States hold "annual" blanket licenses.

Under a per use license, on the contrary, the user would pay only for those compositions actually used during the program." Pet. App. 6a-7a.

**The basic format of the per-program license is derived from Paragraph VII(B)(1) of the 1950 consent decree which directs ASCAP

> ". . . to issue to any unlicensed radio or television broadcaster, upon written request, per-program licenses, the fee for which
>
> > (1) in the case of commercial programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster, . . ." (E 131)

Thus, as the court of appeals held, ASCAP's licensing on a per-program basis is price-fixing for the same reason that its licensing on a blanket basis is price-fixing. In both cases, music publishing corporations and writers do not compete on a price basis but sell on prices and terms established by the ASCAP Board.

Also, while a per-program license could be constructed to enable the user to escape paying ASCAP a per-program fee for programs as to which *all* the ASCAP music used has been directly licensed,* it *cannot* be fashioned to permit such an escape for programs as to which *less than all* of the ASCAP music used is directly licensed. In other words, the form of the license imposes an "all-or-nothing" obstacle course to the direct-licensing possibility.

If ASCAP's per-program fee were reduced for each program to take account of the nature and quantity of uses for which the packager, (or, when producing its own programs, CBS) obtained direct licenses, then the per-program fee payable to ASCAP would, of course, be limited to, and vary with, the nature and quantity of the uses for which no such direct licenses had been obtained. And if the fee were made to vary in accordance with the nature and quantity of non-directly-licensed uses, then the ASCAP license providing for such variance would no longer be a per-program license, but a per-use license. That, of course, is the very form of license sought in this case (in the alternative and as a transitional measure—*see* Point IX of our brief).

Furthermore, the per-program license would effectively discourage the use of both ASCAP and BMI music on any single program and is thus patently anti-competitive in this sense alone. Once an ASCAP composition is selected, the incremental cost to the producer of using additional ASCAP compositions would be zero (Steiner Tr. 4444-45). If the producer would like to use a BMI composition as well, under a BMI per-program license, the consequence of so doing would be to double his music expense for the program (and, at per-program rates of four and one-half or even two times the blanket rate, that penalty would obviously be substantial). There might be occasions when the requirements of a particular program would necessitate the payment of this form of tribute. Approximately 70% of CBS's programs now, in fact, use both ASCAP and BMI music (PX's 836-37). But the dis-

It might be noted that the royalty rate of a per-program license will necessarily be higher than the blanket rate. To offer the two licenses at the same rate would simply eliminate the blanket license, since, in that event, the broadcast user would always accept the per-program license, pay nothing on programs using no ASCAP music, and thus automatically reduce its fees (even though its total usage of ASCAP music remained constant).

For that and other reasons, ASCAP has insisted upon, and historically obtained, per-program rates four and one-half times those of the blanket rates (E 5 (para. 11), 285, 354); and ASCAP believes that ratio would be justifiable in relation to a television network (Fagan D 524-29). In fact, ASCAP claims to have lost money on the few per-program licenses it has issued, despite royalty rates of four and one-half times that of the blanket figure (Finkelstein Tr. 3617; Fagan D 467, 526-27).

*The BMI per-program license cannot permit such escape because BMI possesses the exclusive right to license the music in its pool (JA 65, para. 5; E 578 (para. III A), 583 (para. III A), 588 (para. 4(a)).

The only per-program license ever issued by ASCAP in the television field was that offered to television stations in the mid-1950's (initially accepted by several and presently held by none) (E 335; Marks Tr. 2435). In addition to the "all-or-nothing" provision referred to above, it so hedged and conditioned the direct-licensing escape clause with unnecessary restrictions as to make direct-licensing impossible. There is no need here to review those additional restrictions. We agree with the district court below that they could be removed in consent decree proceedings, although ASCAP would predictably oppose any such change (*see* JA 396; Fagan D 530-32) and the proceedings to achieve it would be prolonged and costly. But we may pass that point because the structural elements of the license—restrictions that cannot be removed (*i.e.*, without granting the per-use relief alternatively sought in this suit)—are sufficient in themselves to demonstrate its illegality.

incentive to do so under a per-program system is self-evident. (Fisher Tr. 1712-14; Finkelstein Tr. 3769-70; Nathan Tr. 4011-13, 4018-19; Steiner Tr. 4444-46).

The district court considered neither these structural elements of the per-program license nor their anti-competitive effects. In reaching its principal ruling in this area, that court found:

> (a) that the vast percentage of CBS's entertainment programs did not contain " 'outside' published music" but only music written for the program—and that, for such programs, the music could be licensed directly "without difficulty," the per-program fee escaped, and access to a competitive market obtained (Pet. App. 109a); and
>
> (b) only "a very small portion" of CBS's programs used "outside" published music (for which there was no direct-licensing machinery) so that, for those programs, a per-program license "could be a logical alternative" (*ibid.*).

Presumably, the district court's conclusion was (since no other is apparent) that the anti-competitive impact of the per-program format was without legal significance because it would apply to only a "very small portion" of the CBS programs. If so, the conclusion is wrong in fact and law; and egregiously so in both.

First, while music written for the program is transactionally accessible to packagers, that fact hardly means that the price of such transactions would be at competitive market equilibrium levels. In fact, the "all-or-nothing" provision of the per-program license would ensure just the reverse by creating a price-inflationary effect over and above the price reference point (now $1,000 a feature use) at which ASCAP would be effectively selling to other networks (Fisher Tr. 1717-18, 1723-24). Dr. Fagan, ASCAP's Chief Economist, admitted that price-inflationary

effect in the most explicit terms (D 538-39). And it is evident why.

Under a per-program systems, the producer would be committed in advance to pay ASCAP $5,000 or 9% (or whatever the per-program rate is) for each program using ASCAP music, or double that amount if he wanted to use both ASCAP and BMI compositions. He could not reduce that fee by using less music or by jumping one or several obstacles of the per-program license itself (*i.e.,* by directly licensing one or several songs). He could only attempt to avoid the entire per-program fee; but to do that he would have to license *all* music directly—"outside" published music *and* music written for the program. Each writer and publisher from whom he sought the means to avoid that full $5,000 or 9% fee commitment would therefore be handed artificial leverage (Fisher Tr. 1715-18).

Every publisher and writer approached would obviously be aware of that factor (Fisher Tr. 1717-18, 1723-24; Fagan D 538-39). Each might use it differently, depending upon his assessment of the strength of his composition; but randomized over thousands of transactions a year, that factor would inevitably inflate prices.

Thus, even assuming that packagers would attempt to surmount these hurdles program at a time, and actually succeed in meeting the all-or-nothing requirement for some appreciable portion of their programs, the bargain struck in these transactions would not be at competitive prices (Fisher Tr. 1717-18), but at prices "tampered with" by the combination's restrictive terms. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940).

Second, the only way that the court could have found that the vast percentage of CBS's programs use only music

written for the program is by adopting ASCAP's method of computing that percentage—*i.e.*, by counting each of the hundreds of one-minute to five-minute news inserts or children's educational programs as a separate "program" equal in value to a one-hour variety program or a two-hour movie (*see* PX's 838, 840-850; AX's 159, 160(a)-(q), and 287). Moreover, since the ASCAP statistic derived by those means ("perhaps 90-95%" of CBS programs—ASCAP Post-Trial Brief 78) was based on the ASCAP music study (AX 287), it is limited to ASCAP music. Thus, in computing the percentage of programs using published music, ASCAP (and, by adoption, the district court) simply eliminated from that category all programs whose published music consists of BMI compositions.

In short, ASCAP put forth a number based on a statistical stunt and the district court not only adopted the conclusion without recognizing the fallacy, but based its central ruling of law upon it.

Third, that legal conclusion would be wrong even if the underlying arithmetic were sensible (and the price-inflationary effect were assumed, *arguendo,* away). For it would mean that the thousands of transactions, AGAC-writer consents and publisher contacts that the ASCAP music study itself discloses would have to be made in order for CBS or packagers to directly license ASCAP published music (Pet. App. 74a) would be confined to that "very small portion" of CBS programs. All the more obvious, then, would be the fact, already implicit in the district court's position, that at the very minimum, *those* programs could not successfully hurdle the per-program obstacle course.

Thus, if the producer of the Captain Kangaroo show (to use an example cited by the district court) were to accept per-program terms, as the court suggested, he would be effectively barred by its all-or-nothing feature from licens-

ing directly the very music that the court emphasizes is so accessible to him, *i.e.*, the music written specially for the program. He could not, in other words, deal directly even with his own staff writers.

As a matter of law, then, the argument defeats itself. A restraint on competition among sellers need not apply to all of the buyer's purchases (or, in this case, programs) in order to constitute a restraint actionable under Section 1. *United States* v. *Loew's Inc.*, 371 U. S. 38, 47-50 (1962).

In point of fact, whether the use of published music is confined to approximately 10% of all CBS programs as the court suggests (obviously, a not inappreciable number) or 50%, those uses account for the great preponderance of the fees now paid and are, therefore, the most significant in terms of measuring the substantiality of the restraint. Published music now generates between 70% and 80% of the ASCAP credits (*see* AX's 159, 160(a)-(q), 287). That means that between 70% and 80% of the fees CBS pays ASCAP were effectively paid for those uses. If those uses were actually limited to less than 10% of the programs, the per-program format would still preclude any form of price competition as to the majority of CBS's purchases.

To be sure, the district court attempted to deal with the all-or-nothing provision of the per-program license which is the root cause of so many of its antitrust problems. The court's suggestion was that CBS bargain with ASCAP

> "for a license which gave it 'credit' (i.e., a reduced rate) where it had obtained direct licenses for part of the music to be performed on the program in question." Pet. App. 111a.

—or failing that

> "because the decrees enjoin ASCAP and BMI from interfering with the direct licensing of compositions,

> [*] on the face of it, it would appear that CBS could argue in consent decree proceedings, if necessary, that ASCAP and BMI are required to offer a per-program license whose price is reduced to reflect the number of direct licenses obtained for the program." *Ibid.*

Although ambiguous, the suggestion is susceptible of only two interpretations. On its face, it would appear to mean that the per-program license that CBS should obtain is one that gives it a dollar-for-dollar deduction from the per-program fee for the amounts spent in directly licensing music for each program. If so, the suggestion posits a license which, apart from its other legal infirmities, would provide no economic incentive for any direct licensing at all. Why would any packager incur any transactional expenses of direct licensing when he could not reduce the amount he was already committed to pay but, at most, take his (or CBS's) money out of ASCAP's pocket and put it into the publisher's. While that interpretation of the suggestion would make it absurd, the only possible alternative construction actually reconfirms the central error of the district court's opinion.

Under this interpretation, the suggestion would be that CBS is entitled to obtain from ASCAP a form of license under which payments would vary with the nature and quantity of use, and would not have to be paid with respect to directly licensed performances. Indeed, the court's second verbalization of this suggestion (in its "Summary of Findings") seems to bear that interpretation out:

> "[CBS] could negotiate a per-program license with ASCAP and BMI whose fee would reflect the amount of music actually performed and failing

*The BMI decree contains no such provision. The court simply misstated the fact.

> that, it could bring proceedings under the consent decree." Pet. App. 113a.

As discussed above, however, such a license is *not* a per-program license at all, but the per-use license sought (as alternative relief) in this lawsuit. Thus, the form of license the district court proposed as a means of curing all of CBS's problems was the very form of license CBS had demanded in its complaint and the district court refused to grant.

Moreover, if such a license were actually available under the ASCAP decree, as the district court thought, the only ground for obtaining it would be, as the court notes, "because the decree enjoin[s] ASCAP . . . from interfering with the direct licensing of compositions" (Pet. App. 111a). But if the ASCAP system (unremedied by per-use relief) interferes with direct licensing—*i.e.*, with CBS's access to a competitive market—then the ASCAP combination is certainly violating the antitrust laws. And since ASCAP is violating the antitrust laws, then the district court's decision certainly should have come out the other way.

Plainly, there is no rule of antitrust law or general jurisprudence that requires a non-signatory to a consent decree to exhaust supposed consent decree remedies before bringing the sort of independent action explicitly made available to a private party under Section 16 of the Clayton Act.

But the court's suggestion is particularly misconceived in view of the fact that the 1950 consent decree does not compel ASCAP to grant licenses under which fees vary with use (*i.e.*, per-use licenses); and if the consent decree does not compel it, it is not, under the decisions in *United States* v. *ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F. 2d 117 (2d. Cir.), *cert. denied*, 377 U. S. 997 (1964) and *United States* v. *ASCAP (Metromedia, Inc.)*, 341

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F. 2d 1003 (2d Cir.), *cert. denied,* 382 U. S. 877 (1965), available in consent decree proceedings. Indeed, what the court of appeals also held in *Shenandoah* was that any commission by ASCAP of antitrust violations was independently actionable irrespective of the decree—a ruling that highlights the error in the district court decision here. For the net effect of that decision was that ASCAP's interference with direct licensing and hence (logically) its violation of Section 1 was remediable by what amounts to per-use terms, which the consent decree does not in fact offer and which the district court refused to grant.

FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS BROADCAST MUSIC, INC., *et al.*

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STATEMENT

In support of a court of appeals decision finding a *per se* violation of the antitrust laws, CBS has filed a 176-page brief, with a 100-page addendum of additional argument. Mindful of the admonition in Rule 40 that

briefs "must be compact, . . . concise, and free from burdensome, irrelevant, immaterial and scandalous matter," we find it impossible to address every one, or even many, of CBS' evidentiary contentions. We seek merely to restore this case to an intelligible context.

SUMMARY OF ARGUMENT

I. Procedurally, this Court is presented with extensive findings of fact made by the district court after a lengthy rule of reason trial. In the court of appeals, CBS sought reversal on the basis of per se illegality, and did not challenge the district court's conclusions under the rule of reason. The district court's findings of fact were adopted by the court of appeals. CBS' evidentiary contentions here should not be considered by this Court.

II. Substantively, the Court is presented with findings demonstrating that BMI's offer of blanket licenses is not a "naked restraint" and does not unreasonably restrain trade:

—performing rights licensing organizations and the blanket licenses they offer are responses to market needs rather than attempts by individual copyright owners to fix prices;

—direct licensing is a realistic alternative for CBS; the claims of impediments are discredited by the courts' findings; and

—the option to choose between available licensing methods belongs to the user of music, not to the individual copyright owner.

III. The "relief" proposed by CBS would be highly anticompetitive. The proposed injunction would eliminate one of the present licensing alternatives and, therefore, one of the methods by which the other television networks can

compete with CBS. The proposed per use license would place a ceiling on the prices at which direct licenses could be negotiated, thus limiting the market forces to movement in one direction only.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS UNDER RULE OF REASON ANALYSIS, UNCHALLENGED BY CBS IN THE COURT OF APPEALS AND ADOPTED BY THAT COURT, SHOULD NOT BE REVIEWED BY THIS COURT.

A. CBS Did Not Preserve an Argument that Defendants' Conduct Is Unlawful under Rule of Reason Analysis.

Throughout its presentation to the court of appeals on its Section 1 claims, CBS urged that the district court's decision be reversed as a matter of law. CBS argued solely that the conduct of the defendants constituted price fixing and was thus per se illegal. No question was presented as to whether the defendants' conduct, if not per se illegal, unreasonably restrained trade.

CBS' main brief in the court of appeals contained four Points. The first three argued price fixing and per se illegality; the fourth dealt with monopolization. CBS did not contend that, within the rule of reason context, the district court erred in its assessment as to the reasonableness of the offering of blanket licenses.

CBS' reply brief stated that, "[t]he thrust of this appeal is that the decision below should be reversed as a matter of law—*i.e., on the facts as the trial court found them.*" (Reply Brief for Plaintiff-Appellant at 1; emphasis in original.) And in oral argument CBS stated that the music licensing market should be analyzed only within the

per se framework: "I don't think it brings in any full blown rule of reason." (Transcript of Oral Argument, October 14, 1976, at 15.)

Since CBS did not challenge in the court of appeals the district court's conclusions under the rule of reason, reversal of the court of appeals' ruling of per se illegality would require that the judgment of the district court be reinstated. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 215 (1976).

B. The Findings of Fact of the Courts Below Should Not Be Reviewed by This Court.

The great bulk of CBS' 276 pages of briefs to this Court is devoted to factual argument, as if CBS wished to retry this case here. CBS' attack on the findings of the district court is foreclosed. This Court has long applied the "two-court rule," under which it refuses to re-evaluate evidence after two lower courts have agreed on findings of fact. *E.g., United States* v. *Nobles,* 422 U.S. 225, 242 n.16 (1975); *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 401 n.2 (1975); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949); *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214 (1948). In *Comstock* v. *Group of Institutional Investors,* the Court stated, "[a] seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

The two-court rule is applicable to this case. After a 29-day rule of reason trial, the district court reviewed the evidence at length and made extensive findings of fact. On appeal, the Second Circuit made clear that it had reviewed the record and adopted those findings. At the outset of its opinion, the court of appeals described Judge Lasker's opinion as "painstaking," and said, "we refrain

from restating the details of the evidence adduced at trial. We refer to that opinion for the evidence supporting the findings." (Pet. App. 2a.)

The wisdom of the two-court rule is underlined by the nature of CBS' evidentiary contentions in this case. In many instances CBS asks this Court, as it asked the district court, to reach conclusions on the basis of fragments of a witness' testimony taken out of context. The district court, which was thoroughly familiar with the trial record, characterized CBS' selections as "snippets," which, "when read in their entirety, . . . take on an entirely different hue." (Pet. App. 84a, 85a. *Compare* Brief for Respondent at 140 *with* the opinion of the district court at Pet. App. 83a-86a.) Without familiarizing itself with the nearly 5000-page transcript, the twenty-four depositions and the more than 500 exhibits received in evidence, this Court would be in no position to evaluate CBS' evidentiary arguments.

While CBS' briefs are of exceptional length, they do not make the exceptional showing of error required for de novo review of the concurrent findings of the courts below.

II. THE FINDINGS OF FACT BELOW DEMONSTRATE THAT THE OFFERING OF BLANKET LICENSES IS NOT INHERENTLY ANTICOMPETITIVE AND DOES NOT UNREASONABLY RESTRAIN TRADE.

A. Middlemen and Blanket Licenses Are Responses to Market Needs.

The existence of BMI, ASCAP, and similar organizations throughout the world and their offering of rights to use a large number of compositions without advance notice, without risk of infringement, and without substantial transaction costs are responses to the nature of the marketplace. There are vast numbers of users, vast numbers of copy-

right owners, and vast numbers of compositions. Most users could not obtain the music they need without a middleman.

There is no evidence whatever in the record that writers and publishers have granted BMI rights to license their music in order to fix the prices that they would receive for use of that music. The court of appeals found, as had the district court, that the offering of a blanket license is not a "naked restraint," and is not generally unlawful. (Pet. App. 21a n.26, 22a, 26a, 37a, 111a.) The courts found also that CBS failed to prove that the existence of the blanket licensing system would "affect the price for each set of individual performing rights" or cause the individual copyright owner to "measure the royalty he asks for a particular performing right by the royalty he has actually been receiving . . . under the blanket license." (Pet. App. 22a n.27, 115a.) Thus, the fundamental premise of cases such as *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), is utterly lacking here: CBS did not establish that the purpose of any copyright owner's affiliation with BMI was to "tamper with" price.[1]

1. CBS' citation of a Department of Justice statement made some years ago in support of a claim by NBC against ASCAP (Brief for Respondent at 165) ignores the different nature of NBC's attack on blanket licensing. In a proceeding under the ASCAP consent decree, NBC sought a license for approximately 2200 designated songs and claimed that ASCAP refused to license these wanted songs apart from the other songs in the ASCAP repertory. Although the Department of Justice (pointing out that the question before the court was solely what the consent decree required, and not what the antitrust laws required) supported NBC's contention that the decree required ASCAP to grant such a license, NBC withdrew its appeal and took a new ASCAP blanket license. *United States* v. *ASCAP* (S.D.N.Y. Civ. 13-95).

Subsequently, the bona fides of NBC's attack on blanket licensing was challenged by BMI. NBC asserted a similar claim against BMI for a license to approximately 500 of the songs in the BMI repertory, and claimed that these 500 songs were tied to the rest of the repertory.

(Footnote continued on following page)

B. CBS Is Not Compelled To Take a Blanket License, but Could Fill All or Most of Its Music Needs with Direct Licenses.

Despite the findings of the courts below, CBS continues to argue that direct licensing is not an alternative available to it without judicial assistance. It contends (1) that the preference of writers and publishers for dealing through a middleman would prevent direct licensing, (2) that there is no "machinery" to facilitate direct licensing, and (3) that, for music "in-the-can," copyright owners would charge premiums for direct licenses.[2] Each conten-

(Footnote continued from preceding page)

BMI moved for, and was granted, a prompt and separate trial on the issue of whether or not NBC's request for the limited 500-song license had been made in a good faith desire to have such a license. On the morning that trial was to begin, NBC elected to take a new blanket license from BMI. *Broadcast Music, Inc.* v. *National Broadcasting Company* (S.D.N.Y. 70 Civ. 1785).

CBS' tying claims here have no factual underpinnings whatever. As the district court found, there was no identifiable group of compositions that CBS could say it did not want to license. (Pet. App. 116a.) Since CBS could not in its own mind separate the wanted from the unwanted, it was not compelled to take a "tied" product. The dismissal of the tying claim was properly affirmed by the court of appeals. (Pet. App. 11a.) Since CBS did not file a cross-petition for certiorari to review the court of appeals' dismissal of the tying claim, that dismissal is final. *See Helvering* v. *Pfeiffer*, 302 U.S. 247, 250-51 (1937).

2. CBS also argues that it could not obtain direct licenses from BMI affiliates because BMI obtains exclusive rights from its affiliates. (*E.g.*, Brief for Respondent at 31n-32n, 57n.) This contention is unfounded and is precluded by the stipulation entered into between CBS and BMI prior to trial. (Pet. App. 32a-33a; 21 A. E387-89, 8 A. 1792-93.) Although the provision in the BMI Decree permitting direct licensing differs in form from the ASCAP provision (which uses the word "non-exclusive" with respect to the licensing right given ASCAP), CBS and BMI stipulated that in substance BMI writers and publishers are as free as ASCAP writers and publishers to grant performance licenses directly. (20 A. E127-28, 8 A. 1786-92; 24 A. E1570, 16 A. 4681-87.) CBS has been unsuccessful in its attempts to walk away from its stipulation in both courts below and should have no greater success here.

tion is refuted by the record and was properly rejected by the courts below.

1. *Attitudes of Copyright Owners: The "3M Incident"*

Whatever their preferences might be, every writer or publisher who testified at trial, with the single exception of CBS' own employee, said that if CBS chose not to take a blanket license, he would negotiate for licenses directly with CBS. (Pet. App. 90a.) The courts below found as fact that writers and publishers would deal directly. (Pet. App. 8a-10a, 111a-120a.)

CBS' continued reliance on the "3M Incident" to show that copyright owners would refuse to license CBS directly or would demand premiums for direct licenses is inexplicable. Some years ago the 3M Company sought licenses for compositions to be used on a series of background music tapes. After negotiations for a license from ASCAP proved unsuccessful, 3M sought licenses directly from certain ASCAP publishers. As the district court found, nearly 80% of the publishers contacted granted performance licenses directly to 3M. (Pet. App. 96a, 99a-100a.) And far from having to pay a premium, 3M paid 25% less for direct licenses than the amount it had originally offered to ASCAP. (Pet. App. 95a n.17.)

2. *Machinery: The "Tomorrow" Hypothesis*

At trial, CBS repeatedly questioned witnesses in terms of what, hypothetically, would happen if CBS announced that it would abandon its blanket license "tomorrow"; witnesses were asked whether direct licenses would be instantly available. The unreality of such a premise was quickly recognized by the district court. (Pet. App. 65a, 78a-79a, 112a-113a.) And while CBS repeatedly quotes the district court as saying that publishers would require "a long period of advance preparation" to create direct licensing facilities (*e.g.*, Brief for Respondent at 78n, 148-49), the phrase CBS quotes appears in a passage in which the court states that "there is no support in the record for the proposition that *CBS* could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation." (Pet. App. 65a; emphasis added.)

What the court found was that "the relatively modest machinery required" could "beyond doubt" be developed during a reasonable planning period. (Pet. App. 79a.)

3. *"In-the-Can": The Supposed Demand for Premiums*

CBS' argument that it could not obtain direct licenses for music in-the-can, *i.e.*, music incorporated in programs already in its inventory, without paying premium prices is specious for two reasons.[3]

First, CBS has in fact already made provision for direct licenses of much of its music in-the-can in the event it does not take a license from BMI or ASCAP. One sample agreement reads in part as follows:

> "If at any time during the Broadcast Periods CBS does not hold an ASCAP and/or a BMI license, the rights granted to CBS hereunder with respect to the motion pictures shall include non-dramatic music

3. It is, of course, CBS which controls putting the music into the can. And most of what CBS now has in-the-can was put there after this lawsuit was started. (Pet. App. 103a n.19.)

> performing rights for all compositions in the motion pictures."[4]

(BX 181 at ¶ 31, Transcript of Proceedings of March 21, 1974 ("March 1974 Trans.") at 70-74. *See also, e.g.,* BX's 172, 214, 215A, 217, 219, March 1974 Trans. at 20, 70-74.)

Second, the district court considered whether some "greedy" copyright owner might seek to "hold up" CBS with respect to music in-the-can, weighed the evidence, and rejected the testimony of CBS' principal witnesses (who had never even met a copyright owner) as "not persuasive." It found the testimony of the publishers that they would not exact premiums from CBS "highly persuasive." (Pet. App. 104a-105a.) The testimony of Albert Berman, who runs the Harry Fox synchronization licensing organization

4. The provision CBS has made for alternative licenses helps to demonstrate the fallacy of its monopolization claim. CBS claims that a BMI blanket license constitutes a relevant product market that BMI has monopolized in violation of Section 2 of the Sherman Act. The monopoly asserted by CBS is a tautological one, for as the district court observed, "a blanket license . . . , by definition, can be practicably obtained only through a collective licensing agent." (Pet. App. 120a.)

The "products" involved in this action are public performance rights to musical compositions suitable for network television use. Public performance rights, and not a BMI blanket license, are what CBS proposes to have its program producers secure directly from individual copyright proprietors and what CBS has conditionally secured in the agreement quoted in the text. A blanket license is merely a form of transaction for the acquisition of performance rights. The products CBS seeks are the rights themselves, and the rights themselves should not be confused with the way in which they are acquired.

Recognizing that the rights themselves are the products in question, the courts below properly rejected CBS' monopolization claim because there are alternative sources of supply for public performance rights. (Pet App. 23a, 118a-120a.) Since CBS did not file a cross-petition for certiorari to review the court of appeals' dismissal of the monopolization claim, that dismissal is final. *See Helvering* v. *Pfeiffer,* 302 U.S. 247, 250-51 (1937).

and who was called as a witness by CBS, was instructive as to why there would not be a hold-up. On examination by CBS, Mr. Berman

> "testified that television producers often prepare programs without synchronization licenses and negotiate such licenses *after* the programs are in the can without being 'held up.'
>
> 'A . . . There is a certain confidence on the part of producers that they will not be held up by publishers when they want to use a song after the fact.
>
> Q Do you have any opinion as to what the basis is for that confidence?
>
> A The basis is that the users and providers of music have to live together. Nobody wants to lock himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action.' (Tr. 981a-82)"

(Pet. App. 104a-105a; emphasis in original.)

Performing rights licensing is a business which depends not on getting a high price on a single sale to one user, but on getting many, many sales to the user at relatively low prices over a long period of time. In view of the pre-eminent position of CBS as perhaps the largest single user of music in the world today, as a common buying and selling agent for approximately 200 separate television stations, and as one of only three national commercial television networks, it is fanciful to suggest that a copyright owner would either refuse to deal with CBS or demand a premium price. (Pet. App. 90a-93a.) The realities of the world of entertainment make it quite easy to comprehend why the court of appeals found that a direct licensing market "*can*

exist," that this market "can exist *even beside* the blanket license," and that "a competitive market *is* available" (Pet. App. 10a, 16a, 18a; all emphasis in original), and why the district court concluded that, if CBS elected to seek direct licenses rather than a blanket license, copyright owners "would line up at CBS' door." (Pet. App. 85a.)[5]

C. The User Chooses the Method by which Music Will Be Licensed.

The power to choose the method by which music will be licensed belongs quite definitely to the user. The reason the user has the power to choose among the alternative methods is that it is the user who selects the music; if the user cannot license certain music by the transactional method he prefers, he will not use that music.[6]

The trial record contains evidence of only two actual efforts at direct licensing—the "3M Incident" described

5. The per program license, of course, is a useful complement to direct licensing. For situations in which it is not known in advance what compositions will be performed, the per program license provides coverage for hundreds of thousands of compositions for use on any program, without advance notice. The license fee is payable only with respect to a program that actually uses music in the repertory.

CBS' categorical statement that such a license "*cannot* be fashioned to permit" the royalty rate to vary if some, but not all, of the music used in a program has been licensed directly (Respondent's Addendum E at 2-3; emphasis in original) has no basis. The BMI single television station per program license, for example, was negotiated to provide a standard rate, and to provide a reduced rate if only a certain type or quantity of BMI music is used. (PX 438, 12 A. 3208-10.) As the district court said, "[b]ecause CBS has never sought to negotiate a per-program license, there is no way to know what its terms might be." (Pet. App. 110a-111a.) The court thus concluded that CBS had shown no reason, legal or factual, why it could not advantageously avail itself of a combination of direct licenses and per program licenses. (*Id.*)

6. This power results, of course, from the functional interchangeability of many songs for television network performances, a factor recognized by both courts below. (Pet. App. 12a, 48a, 92a, 119a-120a.)

above, and the Warner Brothers experience of the 1930's. They demonstrate beyond peradventure the user's absolute power of choice.

In the 1930's, Warner Brothers, a publisher, had a valuable catalog which included the works of such composers as Cole Porter, Rodgers & Hart, Oscar Hammerstein, Vincent Youmans and Jerome Kern. Warner decided to withdraw the catalog from ASCAP and to try to license broadcasters directly rather than through the ASCAP blanket license. The users, however, chose to take only ASCAP blanket licenses, and refused to take direct licenses from Warner. They simply played songs that were still available under the blanket license, and Warner Brothers' music was not used. (19 A. D645-55, 11 A. 3140-42, 3176h.)

On the other hand, 3M, a user, sought direct licenses from publishers; despite the preferences of some of the publishers for dealing through ASCAP, 3M obtained all the music it needed, at bargain prices, through direct licenses. Those publishers who would not license 3M directly did not have their music used.

In both of these situations, the copyright owners who did not license in the manner preferred by the user were excluded and did not have their music used. The preferences of the copyright owners, whether for direct licensing or for licensing through a middleman, were quite irrelevant.

III. THE RELIEF SOUGHT BY CBS WOULD BE HIGHLY ANTICOMPETITIVE.

A. The Proposed Injunction Against the Offering of Blanket Licenses to Television Networks Would Limit Competition Among the Networks.

Both courts below recognized that a market for direct licenses is now available, can function, and can function alongside the availability of blanket licenses. (Pet. App.

10a, 16a, 18a, 79a-108a, 111a-120a.) No injunction, therefore, is required in order to permit *CBS* to avoid having a blanket license.

The acknowledged goal of the injunction sought by CBS is to prevent *NBC* and *ABC* from having blanket licenses for their television networks if CBS elects not to have a blanket license. CBS' top executives testified at deposition that because blanket licenses provide the widest possible latitude for creative programming, CBS' programming would suffer, creatively, if CBS chose to do without a blanket license. (Paley, 19 A. D764-65, 16 A. 4705, 4722; Stanton, 19 A. D876-77, 16 A. 4705, 4720.) If NBC and ABC elected to keep blanket licenses, CBS' programs would have a "second-class appearance" and be "bush league compared to NBC and ABC." (Wood, 19 A. D1016-17, 16 A. 4705, 4721.) CBS Vice President Sipes testified at trial that NBC and ABC "would like to stay in the blanket license and watch me destroy myself." (3 A. 86.) CBS' counsel stated that, "given this vast number of compositions that the pool has, given indeed the immediate accessibility of all those compositions, given the programming flexibility which such a license affords, . . . no competitor [without a BMI or ASCAP license] could allow its competitor to have a license with that pool . . . ." (1 A. JA251.)

In the absence of an injunction, the market would be free to perform competitively. If CBS undertook to license performance rights directly, and the basic premise of this action were correct, *i.e.*, direct licensing proved cheaper and more desirable than blanket licensing, NBC and ABC could be expected quickly to abandon their blanket licenses without need for an injunction. On the other hand, if ABC or NBC viewed blanket licensing as the most desirable method of licensing performance rights—whether because of lower

cost, greater programming flexibility, or both—they could be expected to cling firmly to their blanket licenses.

The true role of the proposed injunction "to oust ASCAP [and BMI] from this market" (Brief for Respondent at 113) is at once apparent: it is to limit competition by NBC and ABC if it turns out that the blanket license is indeed the cheapest, most efficient, and most desirable method of licensing performance rights. The proposal to eliminate competition is an incredible perversion of the purposes of the antitrust laws. But it is exactly what CBS urges on this Court.

B. The Per Use Proposal Would Place a Ceiling on Direct Licensing Prices.

The proposed per use system is also designedly anti-competitive. As pointed out in our main brief at 30-32, the per use system would involve standard rates to be charged by BMI for each type of use of the music in its repertory, and would give CBS two ways to buy a single license for the same composition: it could license a particular song through a BMI per use license at the standard fee, or it could license that song directly from the copyright owner at a negotiated fee.

Given this choice of sources, CBS testified that it would license a song directly only if it could do so for less than the standard per use rate: "the only reason I would go to a copyright proprietor would be to attempt to get a lower price than under the schedule." (3 A. 198.) If the copyright owner sought a higher rate, CBS would either use that song under the per use license at the per use rate or use another copyright owner's song at the per use rate. (4 A. 334-38.) Thus the per use license would provide an artificial ceiling on the prices that could be negotiated by copyright owners in direct licensing transactions.

The ceiling effect is not eliminated by the so-called right of a copyright owner to withdraw a composition from the per use reservoir. The copyright owner would have that right only at certain intervals; he would rarely know, in time to withdraw and negotiate a direct license, that a program producer was interested in using his composition; and his withdrawal would be ineffective with respect to music recorded prior to the effective date of withdrawal, even though broadcast did not occur until after that date. Further, CBS indicated that withdrawal would be a signal to it that the owner of the music would seek to negotiate a price higher than the per use rate for a direct license, and CBS would therefore summarily eliminate withdrawn songs from its consideration. (3 A. 122; 4 A. 365, 428, 605; 5 A. 679-98.)

If CBS were to seek direct licenses now, it could buy in a truly competitive market: one in which prices are allowed to move up as well as down in reflection of relative values. The restriction sought to be imposed by CBS on upward movement of price is quite precisely designed to curtail free market competitive forces.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with directions that the district court judgment be reinstated with respect to BMI and its affiliates.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PERFORMING RIGHT SOCIETY LIMITED AND SOCIETE DES AUTEURS, COMPOSITEURS ET EDITEURS DE MUSIQUE AS *AMICI CURIAE*

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The Performing Right Society Limited ("PRS") and Societe des Auteurs, Compositeurs et Editeurs de Musique ("SACEM") submit this brief as *amici curiae* urging reversal of the judgment of the Court of Appeals.

INTEREST OF *AMICI CURIAE*

PRS is an association of composers, authors and publishers of musical works that was formed in the United Kingdom in 1914 to administer on behalf of its members certain of the rights provided by copyright legislation. A non-profit organization, it has more than nine thousand British members, and also represents composers and publishers in twenty-six other countries, formerly part of the British Commonwealth, that have no indigenous performing right societies.[1] PRS is affiliated on a reciprocal basis with similar organizations in thirty-seven countries, including the United States.

SACEM, established in 1851, is the world's oldest performing right organization. It has approximately 40,000 French members and represents composers and publishers in twenty-four other countries, formerly part of the French Empire, that have no performing right societies of their own. It is affiliated on a reciprocal basis with similar organizations in over thirty nations, including the United States.

The repertoires of both *amici* and their affiliates are made available for performance in the United States through their affiliation agreements with ASCAP and BMI. Under these agreements, ASCAP and BMI obtain performance rights to different portions of the

[1] These countries are: Barbados, Bermuda, British Virgin Islands, Cayman Island, Cyprus, Gibraltar, Guyana, Hong Kong, Republic of Ireland, Jamaica, Kenya, Leeward Islands, Malawi, Malaysia, Malta, Mauritius, Nigeria, Pakistan, Seychelles, Singapore, Sri Lanka, Tanzania, Trinidad, Uganda, Windward Islands, and Zambia. Jamaican music, in particular, is widely played in the United States.

repertoires of PRS and SACEM for licensing to American users. ASCAP and BMI represent the *amici*'s members and affiliates, and protect their rights against unauthorized performances in this country. Royalties are distributed in accordance with ASCAP's and BMI's usual rules and procedures governing royalty distribution to composers and publishers in the United States.

The affiliation agreements among PRS, SACEM, ASCAP and BMI are part of a comprehensive framework of similar agreements among performing right organizations in nearly forty countries throughout the world. This international structure, which has been in place for over half a century, provides a simple, efficient and equitable method by which foreign composers and publishers may have their works recognized and performed in the United States. Conversely, it also provides a fair and effective means for American composers and publishers to compete for recognition in the United Kingdom, France and other countries and have their works performed abroad on a just and non-discriminatory basis.

The present system is the product of many years' experience in meeting the special needs and problems of international licensing of musical performance rights. Its economic and cultural benefits are immense. Economically, it establishes a world-wide market in which musical compositions freely and effectively compete, unfettered by national boundaries. Culturally, the "common market" for performance rights fosters an unobstructed flow, back and forth, of musical creativity throughout the world.

The linchpin of this international system for the licensing of musical performance rights is the blanket license that has now been held illegal *per se* by the Second Circuit in this case. Blanket licensing by ASCAP and BMI has made the musical repertoires of *amici* and their affiliates in nearly forty countries available in the United

States to all the television networks and their vast audiences, as well as to countless television and radio stations, hotels, restaurants, concert halls, and a myriad of other users. It has been the vehicle for such valuable contributions to the American musical scene as those of PRS members Ralph Vaughan Williams, Benjamin Britten, the Beatles, the Rolling Stones and Elton John, and SACEM artists Michel Legrand, Olivier Messiaen, Dimitri Tiomkin, Jacques Brel and Edith Piaf. No alternative form of licensing could function as fairly and efficiently in making possible such a full and universally beneficial international exchange of performance rights. Destruction of the blanket license would leave an irreparable void in the world of music.

Continued access to the American market, with full opportunity for performances on the television networks, is of great importance to PRS, SACEM, and their affiliates and members. For the year 1977, PRS received payments from ASCAP and BMI for performances of musical works in PRS' repertoire of about $3.3 million and $2.2 million, respectively, or a total of about $5.5 million.[2] In that year, SACEM received a total of approximately $1.2 million from ASCAP and BMI.[3] Payments from ASCAP and BMI accounted for about thirteen percent of PRS' 1977 gross revenues, and a smaller, but still significant, percentage of SACEM's 1977 gross revenues. A substantial portion of PRS' and SACEM's receipts from ASCAP and BMI represents royalties earned by the performance of their repertoires on the television networks under blanket licenses.

---

[2] Reciprocally, PRS distributed a total of about $5.3 million to ASCAP and BMI, amounts due for the performance in the United Kingdom of works in their respective repertoires.

[3] In the same year, SACEM distributed a total of approximately $4 million to ASCAP and BMI for performance of their works in France.

PRS and SACEM and their affiliates throughout the world have thus been dealt a shattering blow by the Second Circuit's novel and erroneous interpretation of the Sherman Act outlawing the blanket license as if it were a conventional price-fixing agreement illegal *per se*, serving no purpose except to eliminate price competition. Unless reversed by this Court, that decision will unjustifiably restrict the opportunities of the members of PRS and SACEM and their affiliates to have their works performed on a fair, non-discriminatory and competitive basis in this country. The Court of Appeals seems to have given no thought to the extraordinary and most damaging effect of its Sherman Act ruling upon foreign composers and publishers whose musical works are part of the cultural life of America. Yet its ruling cuts into the heart of the world-wide system of international licensing of musical performing rights—a system that has existed for many decades with the sanction of the Department of Justice and the federal courts, and has functioned equitably and efficiently in promoting the progress of musical arts here and abroad.

ARGUMENT

This Court has been careful to confine *per se* rules to narrow classes of conduct which experience has shown to be so harmful to competition, and so utterly unreasonable and unjustifiable, as to warrant outright, across-the-board condemnation. Just last year, the Court reiterated that the prerequisites for *per se* prohibition of a business practice or agreement are "demanding." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977). Although *per se* rules have the value of predictability and tend to conserve judicial resources in avoiding particularized case-by-case inquiry, "those advantages are not sufficient in themselves to justify the creation of [such] rules," for "[i]f it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an

unintended and undesirable rigidity in the law." *Id.* at n.16. Accordingly, "departure from the rule-of-reason standard must be based on *demonstrable* economic effect rather than . . . upon formalistic line drawing." *Id.* at 58-59 (emphasis added).

Before a business practice may be classified as illegal *per se*, there must be a clear showing, grounded in practical experience and market realities, that leaves no doubt of its "pernicious effect on competition" and its "lack of any redeeming virtue." *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958). Condemnation of conduct as a *per se* violation is an inappropriate short-cut where its "competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). Only after examination of its nature, history, purpose, and competitive effect shows that a practice or agreement plainly warrants condemnation as illegal *per se* will this Court so classify it. The Court must "know enough of the economic and business stuff out of which [the practice] emerge[s] *to be certain*," *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963) (emphasis added), that its aim and effect are anticompetitive and that the gains to be derived from its outright prohibition will far outweigh the losses.

The Court of Appeals' *per se* proscription of blanket licensing of musical performance rights came after no such necessary inquiry into the "economic and business stuff" out of which this international arrangement emerged. Its abstract and doctrinaire approach is precisely what this Court has repeatedly rejected in cases like *GTE Sylvania*, *National Society of Professional Engineers*, *White Motor*, and many others. Even if, as the Second Circuit asserted without support in the record, the availability of blanket licenses might have some effect

in lessening direct "competition" among composers in "selling" performance rights to their works and "bidding" against each other on the basis of "price", the very language strikes a strange and false note in the real world of commerce in music.

Licensing of musical performance rights throughout the world is not like selling automobiles or bananas. Where, as here, the "economic and business stuff" of the challenged practice shows that it came into being, and has continued so long, for reasons wholly unrelated to any purpose to lessen competition or fix prices; where, whatever its superficial appearance, the essence of the practice is wholly different from price-fixing between competitors in the usual context or market; where it performs undeniably valuable commercial functions in an industry with unique characteristics and needs; and where it has no demonstrable anticompetitive impact but, indeed, has been found by the trial court after full examination to be distinctly procompetitive, categorical *per se* prohibition is surely unjustified.

The decision below enlarges the scope of the *per se* price-fixing rule far beyond the bounds delimited by this Court's decisions and by sound antitrust policy. It illustrates once again how any legal rule, no matter how wise and sensible, can be misapplied once one loses sight of its rationale. The *per se* rule is too valuable and important a tool of antitrust enforcement to be stretched, as it was by the Court of Appeals, so far beyond its proper limits as to jeopardize its continuing vitality and utility.

* * *

Although the District Court specifically upheld the use of blanket licenses after extensive analysis of their competitive impact, the Second Circuit assumed that blanket licensing, because it involves the use of "a single agency with a single price," "dulls the [individual copyright owner's] incentive to compete" and "tampers with price

structures." Appendix to Petition for Certiorari ("App.") at 11a-12a, 20a. This without more, in the Court of Appeals' view, automatically brings blanket licenses within the *per se* rule against price-fixing declared in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

But this Court has never held that a cooperative selling agency, merely because its use may have an effect on prices or price competition is, *ergo*, an illegal price-fixing scheme. Certainly *Socony-Vacuum*, on which the Second Circuit chiefly relied, propounded no such sweeping and simplistic principle. To be sure, the opinion of Mr. Justice Douglas spoke of "price tampering" by sellers who had combined under an agreement to restrict the supply of their product. But the dominant fact in *Socony-Vacuum* was that the sellers' agreement was admittedly aimed at suppressing competition and served no economic purpose except to fix prices. That kind of price "tampering" is price-fixing. It hardly follows that *every* agreement or practice that affects ("tampers with") price is *ipso facto* price-fixing. *Per se* condemnation was clearly warranted in *Socony-Vacuum* since the combination there had the same character, object and result as a conventional price-fixing conspiracy. To read *Socony-Vacuum* literally as making *any* "tampering with" price illegal *per se* is to ignore the factual and legal context in which the Court used the phrase and by which it was limited.

As need not be labored, a rule so rigid and indiscriminate as that announced by the Court of Appeals, if it were taken seriously and applied consistently, would condemn practically every form of concerted economic activity. More than half a century has passed since Mr. Justice Brandeis pointed out that "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Board*

of Trade v. *United States*, 246 U.S. 231, 238 (1918). Corporations, partnerships, joint ventures, contractual relationships—all affect competition in some degree and "tamper with" prices in some fashion. If that were enough to bring down judicial *per se* condemnation, no productive unit comprising more than a single individual could survive even the threshold stage of antitrust scrutiny. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (Pt. II), 75 Yale L.J. 373, 377 (1966). The finding of a restraint on the freedom of a trader is the beginning, not the end, of antitrust analysis.

That mere lessening of competition and "price tampering" do not suffice to establish *per se* illegality was confirmed only last term in *National Society of Professional Engineers* v. *United States*, *supra*. There, the Court considered an agreement expressly banning the submission of competitive bids to customers. That agreement obviously suppressed competition and "tampered with" prices. Indeed, the defendants openly acknowledged these effects, as well as the agreement's anticompetitive purpose, and sought to justify the ban on bidding by citing benefits allegedly flowing from diminished price competition in their profession. While concluding that "anticompetitive purpose and effect" were evident "on the face" of the agreement, the Court withheld *per se* condemnation. Instead, the Court held the agreement invalid only after rule-of-reason analysis.

If the rule-of-reason standard was appropriate in *National Society of Professional Engineers*, *a fortiori* it is appropriate here—where, as the District Court found as a fact and the Court of Appeals did not disagree, the blanket licensing of musical performance rights passes full muster under a rule-of-reason analysis. Unlike the engineers' bidding ban, blanket licensing of copyrighted music is not motivated by a need or desire for insulation

from competitive pressures. Rather, it reflects the market's choice of the cheapest and most efficient means of arranging transactions between buyers and sellers in a unique industry. Composers have found it physically and financially impossible on an individual basis to protect against piracy of their copyrighted works. Users have required ready access to a large and changing pool of musical compositions without the risk of copyright infringement, and without the burdens of identifying and negotiating with numerous copyright holders. The blanket license emerged as a pragmatic response to these vital and legitimate commercial needs—not as a device for fixing prices or eliminating price competition. *See* App. at 25a-26a. *See also* Finkelstein, *The Composer and the Public Interest—Regulation of Performing Right Societies*, 19 Law & Contemp. Prob. 275 (1954).

The benefits of blanket licensing are indisputable; even the Court of Appeals acknowledged that the blanket license may "serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable." App. at 22a. In the United States alone, there are over 80,000 composers and publishers holding copyrights in millions of musical works. PRS and SACEM together represent in excess of 50,000 foreign music writers and publishers whose copyrighted compositions also number in the millions. Licensed performances of music in the repertoire of ASCAP alone are estimated at more than 1 billion each year. Comment, *CBS* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783, 786 (1978). Without the availability of blanket licensing, the costs of doing business in this vast and unusually complex market—collecting and disseminating information, negotiating licenses, and monitoring performances—would soar so high that the necessary functions could not be accomplished at all.

Certainly there is no alternative form of licensing that would work as equitably and efficiently to facilitate the *international* exchange of musical performance rights. Under either a system of direct licensing by individual copyright holders, or a system of *per use* licensing through ASCAP and BMI, foreign composers and publishers would be placed at a substantial and unfair competitive disadvantage *vis-a-vis* their American counterparts.

Performance rights to many foreign compositions are held by music writers or publishers who have no American representative (except ASCAP or BMI). In such cases, the special problems of transoceanic negotiation—time-zone differentials, language barriers, and other added costs—would pose enormous, probably insuperable obstacles to network use of foreign music under a direct licensing scheme. Moreover, even those composers and publishers having agents in the United States could not make their musical works available at competitive rates while absorbing the expense of compensating such representatives for the additional burdens of direct license negotiation with users. Agent fees already consume between twenty-five and fifty percent of royalties accruing from an American performance and would doubtless rise still higher if direct negotiations were mandated.

Nor would foreign copyright holders have a fair chance under a per use scheme. Assuming such a scheme is feasible at all, it would likewise entail vastly increased transactional costs. It is difficult to understand how, as the Court of Appeals suggested, "ASCAP itself" could "provide some form of per use licensing which will ensure competition among the individual members . . . ." App. at 22a. Would it simply compile and maintain a fee schedule from which the networks would shop? If so, how would such a list (covering millions of works that may be televised in a variety of differing circumstances) be compiled, and how would it be administered if the network,

for example, wanted a musical work only at a below-list price or if either of two works was acceptable depending on the relative prices? If there is no fee schedule, what would ASCAP's role be in situations where the network desires music of a kind for which numerous individual compositions may be suitable?

Patently, a system of per use licensing would at best be grossly inefficient and at worst totally unworkable. In any case, the inevitable result would be to restrict the flow of musical works from foreign composers and publishers into this country. Without blanket licensing, the American performance rights market would thus be effectively insulated against competition from foreign composers and publishers. To bring this about in the name of antitrust would indeed be ironic.

In sum, blanket licensing of musical performance rights differs radically in kind and degree from the practices which this Court has rightly condemned as *per se* illegal, such as price-fixing. It meets none of the established criteria for departure from the rule-of-reason approach that has been the primary mode of antitrust analysis for three quarters of a century. It has not been, nor could it be, demonstrated that the use of blanket licenses is devoid of "any redeeming virtue." *Northern Pacific Railway* v. *United States*, *supra*, 356 U.S. at 5. On the contrary, all of the available evidence supports, if not compels, the District Court's finding, undisturbed by the Court of Appeals, that blanket licensing of musical performing rights serves vital and beneficial procompetitive functions.

The Court is not confronted here, as it was in *Socony-Vacuum* or even in *National Society of Professional Engineers*, with a practice whose only "justification" is framed in terms of alleged "benefits" to be gained by suppressing competition. In this case a factual record was made in the District Court that blanket licensing of music, in stark

contrast with the arrangements involved in those cases, was developed to provide, and does provide, significant economic benefits wholly apart from any incidental effect it might theoretically have on "price competition" among individual composers each selling directly to networks—a non-existent and unreal kind of "competition." Even the Second Circuit concluded that blanket licensing is "not simply a 'naked restraint' ineluctably doomed to extinction," and that "*[t]here is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need* for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable." App. at 22a (emphasis added).

Nor is there any basis in experience for the Court "to be certain," as the doctrine of *per se* illegality requires, that the effect of blanket licensing is so "manifestly" and "perniciously" anticompetitive that this demonstrably efficient business practice—the product of a half century's experience—should be outlawed in every case, without inquiry into the particular circumstances. *See White Motor Co.* v. *United States*, *supra*, 372 U.S. at 263; *Northern Pacific Railway* v. *United States*, *supra*, 356 U.S. at 5. The Court of Appeals simply assumed that even though composers and publishers retain the right to license their works directly, the mere existence of blanket licenses "provides a disinclination to compete." App. at 22a. But that assumption was contrary to the decision of the District Court—whose factual findings the Second Circuit accepted—specifically upholding blanket license use after elaborate inquiry into its competitive impact. Moreover, as already noted, the Court of Appeals completely overlooked the decidedly procompetitive effect of the free flow of foreign musical compositions into the United States that the blanket licensing system has for so many decades made possible.

Finally, the inappropriateness of banning the blanket license *per se* is tacitly confirmed even in the Second Circuit's own decision. The decision below, as almost all commentators have noted, is internally inconsistent and contradictory. *See, e.g.*, Comment, *The Middleman as Price Fixer: Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 91 Harv. L. Rev. 488 (1977); Comment, *CBS* v. *ASCAP: Performing Rights Societies and The Per Se Rule*, 87 Yale L. J. 783, 796-801.

Apparently attempting to compensate for the obvious defects of its inflexible rule, the Court of Appeals invented a novel exception to the *per se* price-fixing rule, allowing use of blanket licenses in cases of "market necessity." That the court below felt obliged to carve out such an "exception" reflects the error of its ruling on the merits. The very essence of a *per se* rule is that it does not allow for "exceptions" in particular cases. As a law review comment points out, "[t]he court's need to create an exception to the price-fixing rule clearly reveals the deficiencies in its view of price fixing . . . . If the court had recognized that the productive nature of an enterprise is relevant to an evaluation of its pricing effects, it would not have confronted a situation in which it felt called upon to create an exception." Comment, *The Middleman as Price Fixer: Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 91 Harv. L. Rev. 488, 497 (1977) (footnote omitted).

The same is true of the Court of Appeals' approval, in dealing with the remedy, of per use licensing by ASCAP and BMI. Such a scheme would involve precisely the same conduct—use of a "single agency with a single price"—that the court held to be the vice of the blanket license. *See id.* at 491-92, n.26 (observing not only that the remedy suggested by the court below is inconsistent with its theory of antitrust liability, but that per use

licensing actually "departs farther from the competitive ideal than the blanket license" by creating an incentive to reduce use). If blanket licensing is a *per se* violation, it would have to be banned across-the-board, rather than outlawed only in some instances or replaced by another form of licensing containing the same alleged vice. That is the *raison d'etre* of a *per se* rule. To conclude, as did the Second Circuit, that blanket licensing or a legally analogous scheme may be warranted in certain circumstances is to concede that there is no basis for condemning it as a *per se* violation. It is to concede also the correctness of the District Court's findings and conclusion, upon exhaustive examination of the facts, that the blanket licensing of musical performance rights is valid under a rule-of-reason standard.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

BROADCAST MUSIC, INC., ET AL., PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of October 2, 1978.

QUESTION PRESENTED

Whether the method by which ASCAP and BMI license copyrighted musical compositions to the television networks for a fee that does not vary with actual music use is a *per se* violation of Section 1 of the Sherman Act.

STATEMENT

1. The American Society of Composers, Authors and Publishers (ASCAP) is an unincorporated association of some 22,000 authors, composers, and publishers who own copyrights in musical compositions (Pet. App. 26a).[1] ASCAP was formed as a clearinghouse in 1914 to deal with nonpayment for performances and other problems in the licensing of rights to perform musical works (*id.* at 25a-26a). ASCAP secures payment for members' copyrights and detects unauthorized uses of copyrighted music; it licenses users and makes indemnification against infringement charges readily available (*ibid.*). Members grant to ASCAP the nonexclusive right to license their works for nondramatic performances.[2] ASCAP, in turn, issues to users "blanket"[3] licenses

[1] "Pet. App." refers to the Appendix to the petition in No. 77-1578.

[2] A "nonexclusive" right is one that does not inhibit the member from issuing its own license for the same work. Performers thus may obtain licenses from ASCAP, from its members, or from both.

[3] A "blanket" license authorizes use of any or all compositions in the repertory, as often as desired, for the term of the license (Pet. App. 26a). The fee does not vary with the identity of the music used or with the number of uses.

to perform its entire repertory, which includes more than three million compositions (*id.* at 26a-27a). Royalties collected by ASCAP are distributed to its members according to "a schedule which reflects the nature and amount of the use of their music and other factors" (*id.* at 27a).

Broadcast Music, Inc. (BMI) was organized in 1939 by radio broadcasters, and it remains broadcaster-owned (Pet. App. 27a). It is affiliated with some 10,000 publishers and 20,000 writers, whose musical works are licensed by BMI through blanket licenses similar to ASCAP's (*ibid.*). BMI's repertory includes approximately one million works. Almost every domestic copyrighted musical composition is in either the ASCAP or the BMI repertory (*ibid.*).[4]

The licensing activities of ASCAP and BMI are regulated by consent decrees. Under the terms of a consent decree entered in *United States* v. *ASCAP*, 1950-1951 CCH Trade Cas. ¶ 62,595 (S.D. N.Y. 1950), members retain the right to license their works individually as well as through ASCAP (Para. IV(B); Pet. App. 31a-32a & n.4). ASCAP is required to "grant to any user making written application therefor a nonexclusive license to perform all of the compositions in the ASCAP repertory" (Para.

[4] There are several smaller performing rights societies, including one with approximately 300 publisher affiliates. See Note, *CBS* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783 & n.1 (1978).

VI). The decree forbids ASCAP to grant "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do" or the copyright owner cannot be located within 30 days (Para. VI).[5]

The decree permits ASCAP and licensees to negotiate any fee and any form of blanket license on which they can agree. It provides, however, that ASCAP must offer at least a "per program" blanket license, the fee for which would be based on income received for programs in which ASCAP music is played (Para. VII(B); Pet. App. 30a). The fees sought by ASCAP must offer a "genuine economic choice" between per program and other licenses, and ASCAP is restrained from "requiring or influencing the prospective licensee to negotiate for any other type of blanket license prior to negotiating for a per program license" (Para. VII(B)(3) and (C); Pet. App. 30a-31a).

On receipt of an application for a license, ASCAP must "advise the applicant in writing of the fee which it deems reasonable for the license requested."

[5] The rationale for requiring ASCAP to issue a blanket license and for prohibiting it, except in rare circumstances, from issuing licenses to specified compositions is discussed in Timberg, *Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 Law & Contemp. Prob. 294 (1954). Where a user can identify the compositions it needs, it should deal directly with the copyright owners. Otherwise, ASCAP might be able to fix a price for such a license and eliminate competition among its members.

If the parties are unable to agree on a fee within 60 days of the filing of the application, the applicant "may forthwith apply to [the United States District Court for the Southern District of New York] for the determination of a reasonable fee" (Para. IX(A); Pet. App. 31a). In such a proceeding, ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (*ibid.*).

A consent decree entered in *United States* v. *Broadcast Music, Inc.*, 1966 CCH Trade Cas. ¶ 71,941 (S.D. N.Y. 1966), is similar to the ASCAP decree in requiring BMI to offer alternative forms of and fee systems for blanket licenses (Para. VII(B)). Although other provisions of the BMI decree differ from those in the ASCAP decree,[6] the parties have stipulated that CBS could license directly from BMI affiliates with the same ease or difficulty as from ASCAP members (Pet. App. 32a-33a).

Copyright owners affiliated with either ASCAP or BMI thus retain the right to sell licenses for all uses—synchronization, dramatic performances or non-dramatic performances—and to keep all license fees so earned. They regularly license film and stage

[6] The BMI decree, for example, does not provide for the district court to set a "reasonable" fee at a user's request. It does not expressly reserve to affiliates the right to license their works directly. Only where a user is "making direct performances to the public" is individual negotiation required (Para. IV(A)). In view of the basic similarities of the two organizations, however, we will hereafter refer only to ASCAP with the understanding that, except as may be noted, our comments apply equally to BMI.

producers and certain independent television producers of programs for these uses (Pet. App. 67a-69a). Broadcasters are free to purchase such licenses from copyright owners, but typically they have not done so. Since 1946, CBS and the other television networks have continuously taken blanket licenses from ASCAP and BMI (Pet. App. 51a). The fees under these licenses are based on a percentage of the networks' total revenues and do not depend on the amount or distribution of music use (*id.* at 26a-29a). Until this suit was filed in December 1969, CBS had never sought any other form of license from ASCAP, BMI, or their members (*id.* at 50a-51a, 53a).

2. CBS brought this action to challenge the method by which ASCAP, BMI, and their members and affiliates license the nondramatic performing rights to their copyrighted musical repertories. CBS charged that the blanket license not keyed to specific songs actually used is unlawful because it "compels" CBS to pay royalties that are not based on actual music use (Pet. App. 33a). It argued that the pooling of licensing rights and the issuance of a blanket license are price fixing, unlawful tying, a concerted refusal to deal, and monopolization prohibited by Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2, and that these practices also constitute copyright misuse (Pet. App. 34a).

The district court severed liability issues from other issues in the case and, after a trial without a jury, dismissed the complaint. After holding that no *per se* violation existed, the district court viewed the

dispositive question under the rule of reason and copyright misuse law as one of compulsion: whether CBS is coerced into taking a blanket license (Pet. App. 39a, 114a). It found that CBS failed to prove the nonavailability of alternatives to the blanket license, and that, indeed, direct negotiation with individual copyrights owners is feasible (*id.* at 111a-114a).

The court of appeals affirmed the dismissal of all antitrust claims except one. The court recognized that the availability of alternatives to blanket licensing does not dispose of CBS's price-fixing allegations (Pet. App. 11a). Turning to this allegation, the court concluded that ASCAP and BMI are engaged in price fixing. The court based its conclusion on the fact that the payment a copyright owner receives from the blanket license fees collected by ASCAP and BMI is predetermined (*ibid.*). Thus, the copyright owner's "distributive share of the common royalties" is not the same as the payment it would receive in a free market, and, therefore, "is the result of at least the threshold elimination of price competition for the performing rights in" its music (*id.* at 11a-12a).

After concluding that ASCAP and BMI are engaged in price fixing, the court stated that because of "market requirements" price fixing is not always illegal (Pet. App. 13a). This "market necessity" defense is unavailable to ASCAP and BMI, the court thought, because alternatives to blanket licensing are

feasible (*id.* at 14a-17a).[7] Nevertheless, in remanding the case to the district court to consider relief, the court suggested that "the blanket license need not be prohibited in all circumstances" (*id.* at 21a-22a), because it "is not simply a 'naked restraint' ineluctably doomed to extinction" (*id.* at 22a). The court found that the record did not "compel a finding that the blanket license does not serve a market need for those who * * * deem [it] desirable" (*ibid.*). The court thought that existence of the blanket license created a disinclination on the part of members to compete in licensing individually, and it suggested that if ASCAP were "required to provide some form of per use licensing which will ensure competition among the individual members" objections to the current blanket license would be removed (*ibid.*).[8]

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[7] The court relied on this finding to distinguish *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968), in which the Ninth Circuit concluded that ASCAP was not engaged in price fixing. The parties in that case had stipulated that there were no practical alternatives to blanket licensing (Pet. App. 14a).

[8] Judge Moore concurred in the result but stated that he did not believe the ASCAP blanket license to be price fixing (Pet. App. 23a). He later elaborated, in an opinion explaining his vote to deny rehearing, that, in his view, the record did not permit a finding that there was no "market need" for the blanket license, and he stated that on remand the district court should consider "proof and/or argument of the effect on price competition of the blanket license and some form of per use license" (*id.* at 125a).

SUMMARY OF ARGUMENT

The traditional standard for determining whether an agreement violates Section 1 of the Sherman Act is the rule of reason, a standard which requires an economic inquiry into the effect of the agreement on competition in the relevant market, the purpose of the agreement, the percentage of the market affected by it, and similar factors. The rule of reason is not applied, however, when the restraint is price fixing, because price fixing is a naked restraint with no purpose other than to restrain competition. It is thus better to declare the entire category of price fixing illegal *per se* than to inquire into its actual anticompetitive impact on a case by case basis.

A price-fixing agreement is an agreement among competitors to charge a particular price, manufacture a particular quantity, adjust the terms of competition, or otherwise tamper with the price-setting mechanism of the marketplace. Such agreements are unlawful no matter how reasonable the price set may be, no matter how ruinous competition otherwise may be, and no matter how legitimate the association otherwise may be. But an agreement among competitors to market a product or service fundamentally different from anything any of them individually can market has never been found to be price fixing under circumstances where, as here, there is no agreement not to sell the individual products or services at any price the competitors choose, and where the project is not a disguise for price fixing.

As the case of mergers illustrates, not every species of agreement among competitors that somehow has an effect on price is *per se* illegal. The Court has been careful to examine each species of restraint, usually after experience with it, before determining whether it should be categorically deemed unlawful.

Several considerations preclude a determination that the agreement to market a blanket copyright license is *per se* unlawful. ASCAP's blanket license is a distinctive product, fundamentally different from any license any one of its members can sell. The licensee obtains the privilege to use any or all of millions of works, whereas any individual member of ASCAP could license only the privilege to use a relatively small number of compositions. The blanket license, moreover, provides immediate access to music as soon as it is written, provides flexibility in making last-minute programming changes, and provides broad indemnification against infringement suits and competing claims for the use of the same work. The blanket license also saves enormous costs that would otherwise be required to transact the purchase of individual licenses for single performances, especially in the case of music users such as radio stations that frequently play music.

If such a comprehensive product, with its offer of savings, is to be available at all, it must be assembled and marketed through a society such as ASCAP, and the members of the society necessarily must agree on the price at which the product is to be sold. Such an agreement to market a new product or service is

not illegal *per se* under Section 1 even though the parties set its price, because the agreement on the price is essential if the new product or service is to be sold at all.

A different question would be presented if ASCAP's members agreed that they would set the prices at which they could individually sell licenses, or that they would only sell through the blanket license. Such agreements would not be essential to the enterprise of marketing the blanket license. In the present case, however, no such restriction exists, and each member is free to sell licenses to its own music at whatever price it can negotiate. Thus, rather than restricting the choice available to the user, the blanket license offers an additional choice: the user may negotiate individual licenses or purchase a blanket license.

None of this is to say that the blanket license or certain of its features, as applied to television networks, could survive the scrutiny of the rule of reason. It is to say, however, that the court of appeals was in error in holding the blanket license to be *per se* illegal merely because a price is necessarily set in the course of marketing a product fundamentally different from any that any member of ASCAP could offer.

ARGUMENT

THE BLANKET LICENSES ISSUED BY ASCAP AND BMI ARE NOT UNLAWFUL *PER SE*

CBS has waged a broad-ranging campaign against the licensing procedures used by ASCAP and BMI. In the district court, CBS argued that the pooling and collective licensing of copyrights is a form of tie-in that is unlawful because ASCAP and BMI have considerable market power and "coerced" CBS to take blanket licenses. CBS also argued that the licensing arrangements violate antitrust principles under the rule of reason. The district court rejected these contentions, in a lengthy opinion (Pet. App. 24a-121a), after holding a trial that lasted eight weeks.

The focus of CBS's presentation changed on appeal. CBS argued (brief on appeal at 20) that "[t]his case should have been decided on the basis of the fact that [ASCAP and BMI] are selling at fixed prices." Because price fixing is unlawful *per se*, CBS argued that "it is unnecessary in law to consider what the impact of that arrangement [is]" (*id.* at 21). The court of appeals agreed with this position and held that the licensing arrangements are unlawful without reference to their economic effects (Pet. App. 11a-21a). Although the court stated that even facially unlawful arrangements might be approved if price fixing were the only possible way to organize a market (*id.* at 14a-16a), it concluded that television networks could obtain licenses direct from copyright

owners, so that there is no necessity for blanket licensing.

The court of appeals' disposition of this case turns squarely on its conclusion that blanket licenses are a form of price fixing, which is unlawful regardless of its economic effects in particular cases. The single issue before the Court, therefore, is whether blanket licensing is so plainly anticompetitive that detailed factual inquiry is unnecessary. For the reasons stated below, we believe that blanket licensing is not unlawful *per se*, and that the propriety of the procedures used by ASCAP and BMI must be evaluated under the rule of reason. Because the court of appeals did not evaluate blanket licensing of television networks under the rule of reason, this Court need not do so, and the United States takes no position on what the outcome of such an evaluation should be.

A. An Arrangement Is Unlawful *Per Se* Only If It Is Part Of A Class Of Arrangements That Is Demonstrably Anticompetitive

Although the Sherman Act, read literally, prohibits all multiparty restraints of trade, this Court has held that it precludes only agreements that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 58 (1911); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). Whether a restraint is "unreasonable" depends on its effect on competition in the market, the purpose of the restraint, the percentage of the market affected and similar conditions. *Chicago Board of Trade* v. *United*

States, 246 U.S. 231, 238 (1918); *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 688-692. Some categories of restraints, however, are so clearly anticompetitive that repetitive inquiries into their reasonableness in case after case are not worthwhile. It is better to declare the entire category of restraints unreasonable *per se*, not only to avoid exhaustive market assessments in every case but also to provide clear guidelines for antitrust compliance. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 609-612 & n.10 (1972); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977).

An agreement among competitors to charge a particular price, manufacture a particular quantity, adjust the terms of competition, or otherwise tamper with the price-setting mechanism of the marketplace is unlawful *per se*, no matter how reasonable the price set may be, no matter how ruinous competition otherwise may be, and no matter how legitimate the association otherwise may be.[9] But this Court has never found an agreement among competitors to

[9] *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 331-332, 342 (1897); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940); *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950); *Citizens Publishing Co.* v. *United States*, 394 U.S. 131, 135 (1969); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781-782 (1975); *National Society of Professional Engineers* v. *United States*, *supra*; *United States* v. *Addyston Pipe and Steel Co.*, 85 F. 271, 282-283 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

market a product or service fundamentally different from anything any of them individually could possibly market to be price fixing under circumstances where no agreement is made to prevent any of them from continuing to sell their individual products or services at any price they choose, and where the project is not a disguise for price fixing.

In the mine run cartel case, in which otherwise independent competitors agree to change prices or the terms of competition, the agreement imposes significant costs on society. An increase in price is accompanied by a decrease in production, as buyers seeks substitute products. This substitution diverts resources away from their most productive use and reduces the efficiency of the market.[10] Where there are economies of scale, the inefficiency is compounded because each member of the cartel cuts back on production at the margin, where production is least costly. In most cases of cartelization the average cost and the marginal cost of producing a particular item thus rise, again to society's detriment.[11] Moreover, it has been suggested that the prospect of obtaining monopoly profits leads members of the cartel to devote resources to "monopolizing"—that is,

[10] For general discussions of the costs of cartels and price fixing, see II P. Areeda & D. Turner, *Antitrust Law* ¶¶ 401-405 (1978); R. Bork, *The Antitrust Paradox* 90-160 (1978); R. Posner, *Antitrust Law: An Economic Perspective* 8-22, 237-255 (1976).

[11] See Areeda & Turner, *supra*, at ¶ 405.

to invest time and money in forming the cartel and in obtaining a larger share of the monopoly profits.[12]

But not everything that affects price creates the damages discussed above, and therefore not every joint or collaborative action that may affect price is unlawful *per se*. Many things may affect price: a merger between competitors, the exchange of economic information, joint research or exploration ventures, and so on, may have significant effects on the market. But each of these events by itself, despite the effect on competition, is not unlawful *per se*: mergers may have offsetting efficiencies, joint research or exploration may be beneficial. The Court has been careful to scrutinize each species of competitive behavior claimed to be unlawful to ascertain whether it is so likely to be anticompetitive—so likely to produce the varieties of inefficiency and waste discussed above—that the courts should decline to inquire whether a particular example of the species has all of the attributes that make the species itself anticompetitive. We turn to that inquiry.

B. Performing Rights Societies Are Not "Naked Restraints," And So A Detailed Inquiry Into Their Competitive Consequences Is Necessary

ASCAP undoubtedly is an association composed of persons who otherwise are competitors. It offers a

[12] In some cases, it has been argued, the competitors could dissipate the entire monopoly profit in this way, leaving the industry with higher costs and no discernible supracompetitive return. See Posner, *supra*, at 11-14; Posner, *The Social Costs of Monopoly and Regulation*, 83 J. Pol. Econ. 807 (1975).

license at a cost set by ASCAP, and in so doing alters the circumstances under which copyrights are available in the marketplace. The arrangement challenged here thus has important features in common with other arrangements that, this Court has held, are *per se* illegal. The court of appeals' analysis went no further. We submit, however, that performing rights societies, and blanket licenses for copyrighted works, do not invariably produce inefficiencies and waste of the sort that should lead to automatic condemnation. This is so for two reasons: first, the blanket license is a product that no copyright owner could offer by itself; second, ASCAP achieves substantial efficiencies that are directly beneficial to music users as well as composers.[13]

1. *The blanket license is a unique product.*

What ASCAP sells is fundamentally different from any license any one of its members can sell. Each member of ASCAP owns relatively few copyrights. Although some users, such as stage and film producers, may purchase all the rights they need directly from the copyright owners, other users of music—such as radio stations and restaurants—prefer an altogether different license that "blankets" millions of songs owned by thousands of copyright owners. No single copyright owner is able to sell such a blanket license.

[13] We do not argue that the consent decrees entered in the government's suits against ASCAP and BMI "disinfect" their activities; the decrees are not material to the antitrust analysis of the blanket licenses. See Pet. App. 18a-19a.

By pooling their three million compositions, the members of ASCAP are able to market a blanket license. The blanket license benefits users by providing: (1) broad indemnification against infringement suits and protection against competing claims for the same work; (2) immediate access to works as soon as they are written; and (3) flexibility in making last-minute programming decisions, because all music in the repertory is automatically covered by the license. The blanket license serves users' legitimate business needs that cannot be served by individual copyright owners. The individual copyright owners, moreover, retain the right to sell per use licenses as they please.

In agreeing to include their works as part of a general license, members necessarily must authorize ASCAP to negotiate a fee, and the members must agree on how it shall be divided. Whether members set per use fees for their work, whether they agree to share in a percentage of a flat fee, whether their receipts are higher or lower than direct licensing would yield, the fact remains that a blanket license is impossible without some form of agreement on what the licensee will pay and how it shall be divided.

Were this a case of an agreement among copyright owners to establish minimum prices for their individual licenses or to establish a sham organization for the same purpose, it would undoubtedly be unlawful *per se*. But the combination of copyright owners to offer a unique product adds to the options available in the market, in a way that a simple

cartel does not. This Court has never held that an agreement among competitors to market a product or service fundamentally different from anything any of them could possibly market individually is unlawful *per se*. Indeed, the Court's statements over the years (albeit in *dicta*) recognize that, so long as the competitors do not also fix prices on their individual products or services, the agreement to set a price on the new product or service is not illegal *per se* because such an agreement is essential if the new product or service is to be offered at all.[14]

For example, the antitrust laws, as Judge Taft observed in *United States* v. *Addyston Pipe and Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899), tolerate the restraint on competition between partners resulting from partnership agreements because the restraint is incident to the main purpose to carry on a successful business. In the present case, it is unnecessary even to go that far, for the district court found no agreement among ASCAP members preventing them from licensing their individual works as they please (and, in fact, as they do for film and stage performances and television synchronization rights (Pet. App. 67a-68a)). The only restraint respecting price is incident to and

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[14] *E.g.*, *United States* v. *Trans-Missouri Freight Association*, *supra*, 166 U.S. at 329; *United States* v. *Joint Traffic Association*, 171 U.S. 505, 567-568 (1898); *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 163, 174-175 (1931); *United States* v. *Addyston Pipe and Steel Co.*, *supra*, 85 F. at 281, aff'd, 175 U.S. 211 (1899). See also *Chicago Board of Trade* v. *United States*, *supra*, 246 U.S. at 238; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

essential to the marketing of a blanket license distinctly different from any license any individual alone could sell.

2. *Blanket copyright licensing saves the costs of transacting for individual copyrights and of enforcing the owner's rights.*

Many users of copyrights play music constantly. Some radio stations, for example, play music around the clock; they may need access to 20 or more copyrighted songs every hour. The costs of negotiating with each copyright owner could be substantial. Moreover, because thousands of radio and television stations may use copyrighted music, the owners of copyrights, acting by themselves, have no feasible means of detecting unauthorized uses. The costs of entering into licenses as needed, and of enforcing the owners' rights against many unknown potential users of music, were the impetus underlying the formation of ASCAP.[15]

Performing rights societies thus are valuable in reducing the costs that would be associated with multiple transactions and with enforcement. The costs of transactions could be formidable. Prospective users of music would need to enter into a separate license for each song. Copyright owners would need to gather information about the identity of the buyer and the nature of the proposed use in order to know what price should be sought for a license. In many cases the costs of finding the copyright

[15] See generally Note, *supra*, 87 Yale L.J. at 784-786.

owner and negotiating a license would exceed the value, to the user, of any particular piece of music. It has been estimated that the nation's television and radio stations perform ASCAP music more than one billion times annually; [16] the costs of negotiating separate licenses for each performance would be astronomical.[17]

The considerations we have set out above distinguish blanket licenses offered by performing rights societies from ordinary cartels.[18] We do not say that

[16] J. Dean, *The ASCAP Survey: Its Design and Objectives* 1 (1963), unpublished pamphlet cited in Note, *supra*, 87 Yale L.J. at 786 n.25.

[17] CBS has argued that blanket licensing of network performances is unnecessary because the value of the music to it far exceeds the cost of individual transactions and because copyright owners easily could detect unlicensed network performances. We do not dispute these factual assertions, but it does not follow that the special circumstances of CBS and the other networks should affect the analysis of this case. Whether a particular species of conduct is unlawful *per se* should depend, as we have emphasized, on the necessary tendency of its competitive consequences. That is why, once the *per se* rule has been invoked, defendants cannot justify their conduct by pointing to a particular benefit it may produce in a particular case. The *per se* rule cuts off such lines of inquiry. Similarly, a plaintiff should not be able to take a species of conduct, ordinarily subject to the rule of reason, and subject one application to it to *per se* analysis on the argument that the usual benefits of the species do not obtain in a particular application. The argument that particular circumstances -ap conduct of its justification should not be the source of a rule of *per se* illegality; it should be, instead, a pertinent consideration for analysis under the rule of reason.

[18] Because of the considerations discussed in the text, blanket licensing of copyrights is not unlawful *per se*. It is

any of the considerations, standing alone, necessarily would be sufficient. Our point, rather, is that these things coalesce. The blanket license offers a new product that yields substantial direct savings for copyright users and copyright owners alike. The blanket license therefore is not a species of collaboration so obviously anticompetitive, in the run of cases, that the circumstances of particular cases should be ignored. It is not unlawful *per se*.[19] That is the point

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therefore unnecessary for this Court to consider the suggestion of the court of appeals (Pet. App. 14a-16a) that a "market necessity" defense may be available in some cases despite a finding of unlawfulness *per se*. Although the court of appeals relied on the brief for the United States as *amicus curiae* in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968), as the basis for this suggestion, we believe that the court has misread that brief. The United States did not argue that blanket licenses are unlawful *per se* but that some form of defense is nonetheless available; it argued, instead, that blanket licenses serve a valuable economic function and therefore should be evaluated under the rule of reason. In *K-91* itself, the brief argued, the record showed the blanket license to be lawful under a rule of reason analysis. (Because of the dispute that has arisen concerning the interpretation of that brief, we reproduce it as an appendix to this brief.)

At all events, we submit that there could be no acceptable "market necessity" defense to activity that is unlawful *per se*. The reason for having *per se* rules is that it is necessary, at some point, to cut off further inquiry and to lay down clear principles that will govern even if they do not precisely fit some particular case. It is not possible to entertain a "market necessity" defense without discarding the idea of cutting off inquiry, that is, without discarding the idea of *per se* rules.

[19] Petitioners raise for review the court of appeals' apparent conclusion (Pet. App. 23a n.29) that the blanket license amounts to copyright misuse under Section 1 of the Sherman

of the distinction made by Judge Taft in *Addyston Pipe* between naked restraints, which are unlawful *per se*, and restraints involving partial integration, such as partnerships, where the arrangement among competitors holds out strong promise of economic efficiency.

C. It May Be Appropriate For The Court Of Appeals To Give Further Consideration To The Lawfulness Of Blanket Licensing Under The Rule Of Reason

At the risk of repeating what is clear, we emphasize that our discussion does not indicate approval of the blanket licensing system as applied to television networks. The blanket licenses must be evaluated under the rule of reason, which the court of appeals did not do. This Court need not decide, and we therefore have not discussed, that rule of reason issue.

As the lengthy litigation between the United States and the performing rights societies indicates, however, blanket licensing may raise serious antitrust problems. It is troubling, for example, that there are only two large performing rights societies.[20] This may

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Act. Because the court of appeals' holding in this regard depends entirely on its conclusion that blanket licenses are unlawful *per se*, there is no reason for this Court to give separate consideration to the question.

[20] The suggestion in the brief of Aaron Copland, *et al.*, as *amici curiae* that performing rights societies are no different, in any economic sense, from law firms therefore is unpersuasive. Ordinarily a market for legal services contains more than two law firms; a merger of every law firm in Washington, D.C., would raise serious antitrust questions under the

create opportunities for collaboration and oligopolistic behavior. It may be, too, that the economic benefits of blanket licensing do not pertain to certain users, so that the justification for collaboration among copyright owners is correspondingly reduced.[21] Moreover, blanket licenses may initially be so attractive that individual licenses all but disappear. Then music users could be caught in a position that gives performing rights societies, and their members, substantial opportunities to misuse their economic position.

Because television networks have a blanket right to perform any copyrighted work, the producers of television shows and movies need not obtain, at the time of production, any performance rights. They typically obtain only the right to synchronize the music with the other material in the show; it would be wasteful for the producer to obtain a broadcast right that the network already possesses (Pet. App. 66a). Networks and individual television stations accumulate substantial inventories of shows and movies "in the can." If they were to discontinue the blanket license, they then would be required to obtain performance rights for these already-produced shows. This attempt would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows "in the can." It would produce, in other words,

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rule of reason that cannot be answered as easily as *amici* suggest.

[21] See note 17, *supra*.

a case of bilateral monopoly.[22] Because pricing is indeterminate in a bilateral monopoly, television networks would not terminate their blanket licenses until they had concluded an agreement with every owner of copyrighted music "in the can" to allow future performance for an identified price; the networks then would determine whether that price was sufficiently low that termination of the blanket license would be profitable. But the prospect of such negotiations offers the copyrights owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing despite a change in market conditions that may make other forms of licensing preferable. Whether such abuse would occur is difficult to know; CBS has never sought to negotiate with copyright owners for future performing rights for music "in the can." But the possibility certainly exists.[23]

There are other ways, which need not be recounted here, in which market arrangements (such as blanket

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[22] See *National Broiler Marketing Association* v. *United States*, No. 77-117 (June 12, 1978) (White, J., dissenting); G. Stigler, *The Theory of Price* 207-208 (3d ed. 1966).

[23] The district court found that the owners of copyrights on music "in the can" would not coerce CBS if it sought to obtain performing rights, and the court of appeals held that this finding is not clearly erroneous (Pet. App. 8a-10a). The district court's findings, however, addressed what was essentially a tie-in argument; the court did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS's dropping the blanket license sufficiently high that ASCAP and BMI could take this "termination penalty" into account in setting fees for the blanket license.

licensing), although offering theoretical benefits to the economy, may become anticompetitive over time. These possibilities are appropriately addressed under the rule of reason. Because the court of appeals did not consider any rule of reason arguments, they would remain open on remand from this Court, if CBS has properly preserved them. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312-314 (1971).

As we read CBS's briefs in the Second Circuit, however, CBS relied entirely on a *per se* price-fixing theory. If that is the proper interpretation of its briefs, then the appropriate disposition of this case is to reverse the judgment of the court of appeals and remand for reinstatement of the district court's judgment. Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 215 (1976); *Chicago Board of Trade* v. *United States, supra*, 246 U.S. at 238, 241. We take no position on whether this is the appropriate disposition.[24]

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[24] The Court also might consider remanding the case so that the court of appeals could determine what issues were properly raised before it.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds that blanket licenses of copyrights are *per se* violations of the antitrust laws.

Respectfully submitted.

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NOVEMBER 1978

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 147

K-91, INC., PETITIONER

v.

GERSHWIN PUBLISHING CORPORATION, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On October 9, 1967, this Court invited the Solicitor General to express the views of the United States on this case. This memorandum is filed in response to that request.

STATEMENT

This is an action for infringement of the copyrights on some 183 recorded musical compositions

(F6).[1] Respondents, the owners of the copyrights, sued petitioner, a corporation operating radio station KIXI in Seattle, Washington. In 1961 and 1962, that station gave public performances for profit of the compositions by broadcasting recordings of them without paying any royalties and without the owners' consent (F2, 3, 4, 6, 7).[2] Some of the defendant radio stations have been engaged in such a practice for at least 10 years (F8).

Petitioner admitted the infringement of the copyrights, but defended on the ground that respondents could not maintain their suit because, as members of the American Society of Composers, Authors and Publishers ("ASCAP") they had formed an unlawful conspiracy in violation of the antitrust laws[3] which was engaged in price-fixing and block-booking of its members' works (Pet. App. 5, 13). It counterclaimed, seeking treble damages and an injunction against further renewal of the copyright (Pet. App. 14).

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[1] "F" refers to the Findings of Fact made by the District Court.

[2] Suits were also filed against two other Washington corporations operating radio stations and an individual officer of one of them. However, these defendants did not appeal from the district court's adverse ruling.

[3] Petitioner also asserted that respondents had violated laws of the State of Washington governing copyright protection (Chapter 19.24 R.C.W.), and were barred from relief by the "unclean hands" doctrine because they had unlawfully extended their individual copyright monopoly. Neither of those issues is presented in the petition for certiorari.

ASCAP is an unincorporated membership association of some 8,000 authors, composers, and publishers who own copyrights in various separate musical compositions (F16). It licenses these works for non-dramatic public performances (F18). ASCAP's musical repertory, which is constantly changing as new copyrights are added and old copyrights expire (F23), includes more than one million works (Pet. App. 6).

Each respondent in the instant case has granted ASCAP the non-exclusive right to license its works for non-dramatic public performances for profit (F21). This licensing activity is regulated and controlled by a consent decree entered in *United States* v. *ASCAP*, S.D.N.Y., Civ. No. 13-95[4] (Br. in Opp. App. 1a-17a). As pertinent here, the decree requires ASCAP to "grant any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Par. VI). However, the decree forbids ASCAP from granting "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do * * *" or the composer cannot be located within 30 days (Par. VI). Upon receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." ASCAP must avoid discrimination in fees (Par. VIII), and must offer comparable fees to all

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[4] CCH Trade Cases, 1950-1951, ¶ 62,595.

applicants similarly situated (Par. IX(C)). If the parties are unable to agree upon a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply [to the District Court for the Southern District of New York] for the determination of a reasonable fee * * *" (Par. IX). In such a proceeding ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (Par. IX).

In addition, the 1950 consent decree forbids ASCAP from charging license fees for commercial programs which are based upon a percentage of income from programs not including ASCAP compositions, unless the broadcaster desires such a license (Par. VII(A)). It also requires ASCAP to offer per program licenses for commercial programs for a flat fee or for a percentage of revenue from the program in which ASCAP music is played (Par. VII(B)). ASCAP must offer "a genuine economic choice between per program and blanket licenses" to stations with relatively few commercial announcements, and is restrained from influencing the licensee to negotiate for blanket licenses prior to negotiating a per program license (Par. VII (B) and (C)).

For radio stations located in the State of Washington a special arrangement under the decree was established in a consent order.[5] The order provides for

[5] This order resulted from differences between ASCAP and certain Washington broadcasters concerning the effect of a Washington State statute, R.C.W. 19.24, which makes it unlawful for combinations of copyright holders to issue licenses

two types of licenses: A blanket radio license and a per program radio license. Both licenses grant the licensee the right to perform any composition in the ASCAP repertory. The blanket license fee is 2.125 percent of the licensee's overall revenues from sale of time on the air, after certain deductions. The per program license fee is 8 percent of the gross revenues derived from the particular programs in which ASCAP compositions are performed (F38-45; Pet. 8).

Petitioner has never applied for either form of license; nor has it ever sought any other kind of license (F48). Since ASCAP's licenses are nonexclusive, respondents also have the right individually to license their works on any basis, per piece or otherwise, which is mutually agreeable to applicants and themselves. Petitioner has never attempted to obtain such a license (F50-51).

The parties stipulated that it would be virtually impossible for broadcasters and copyright holders to arrange separate licenses and payments for each performance on radio of a copyrighted composition (R. 30, Agreed Fact 50). And the district court found that a central licensing agency such as ASCAP is the only practical way that copyright proprietors may enjoy their rights under the federal copyright laws and that broadcasters and others may conveniently obtain licenses for the performance of copyrighted music (F25). It found that single copy-

in the State of Washington for the right of public performance of their copyrighted works, except on a per piece basis (see Br. in Opp. 11-15; F38-45).

right owners cannot deal individually with all users or individually police the use of their songs (F25); and that a single radio station may broadcast as many as 60,000 performances of recorded musical compositions per year involving as many as 6,000 separate compositions (F11-12).

The district court concluded that the defendant radio stations had infringed the respondents' copyrights and that petitioner's defenses and counterclaims under the antitrust laws were without merit (Conclusions of Law 2, 15).[6] On appeal by petitioner, the Court of Appeals for the Ninth Circuit affirmed (Pet. App. 26, 27). The court held that no issue was presented as to whether the decree immunized ASCAP from further prosecution for violation of the antitrust laws. It determined, however, that ASCAP was not a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. Noting that when an applicant claims that ASCAP's fee is unreasonable, the court which entered the consent decree can be asked to fix the fee, the Ninth Circuit concluded that ASCAP cannot fix prices because "so long as ASCAP complies with the decree, it is not the price fixing authority," and indicated its disagreement with the view "that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activi-

[6] Petitioners and ASCAP have entered into a retroactive license agreement which as extended runs from January 1, 1959, to December 31, 1967 (Br. in Opp. 15).

ties that might have this effect are prohibited by the decree" (Pet. App. 18). In addition, the court concluded that because ASCAP's licensing authority is not exclusive and prospective licensees may therefore seek individual arrangements with individual composers, the activities disclosed by the record did not violate the antitrust laws (Pet. App. 19).

DISCUSSION

In substance, the question presented by the present petition is whether the bulk-licensing methods by which ASCAP's members market rights to perform publicly for profit recordings of their copyrighted musical compositions violate the antitrust laws. The court of appeals concluded that no antitrust violations were shown, after finding "that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree" (Pet. App. 18), and pointing out that music users may make individual arrangements with separate copyright holders if they wish, instead of dealing with them through ASCAP. In the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions—the result below, in our view, seems correct, and review by this Court would not appear to be warranted.

We do not understand the court below to have held that the consent decree now in force against ASCAP of itself makes lawful what would otherwise be unlawful (see Pet. App. 17-18). To the extent that

ASCAP's activities, whether under the consent decree or unregulated, violate the antitrust laws, both the United States and private parties have a continuing remedy under the Sherman Act. Nothing in the holding below is to the contrary.

The existence and operation of agencies which collectively license the right to perform musical works raise difficult problems under the antitrust laws. See, *e.g.*, *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y.); *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn.); *Affiliated Music Enterprises* v. *SESAC Inc.*, 60 F. Supp. 865, 875 (S.D.N.Y.). Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished.

The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective

power thus created. *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344; *Chicago Board of Trade* v. *United States*, 246 U.S. 231. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year,[7] the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them. ASCAP's repertory includes a large percentage of the nation's copyrighted music. This results in a situation which can lead to abusive discriminations among users, if not effectively regulated. Thus, it is quite reasonable to require ASCAP to offer the same terms to all users similarly situated. And because users' requirements for separate pieces are continuous, the volume of demand enormous, and

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[7] Individual stations broadcast thousands of playings of musical compositions each year, and ASCAP has in excess of one million musical compositions in its repertory at any one time (see Pet. App. 6).

the value of each single performance small, separate negotiations on a per piece basis are not practicable. There is simply no escaping, as a practical matter, the licensing of the works in bulk. Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the individual copyright holder should also be preserved for those who might be able to take advantage of it. Therefore, the right to license in bulk delegated to the collective agency must be non-exclusive, so that users have the option of choosing a blanket license or negotiating with individual copyright holders. Cf. *United States* v. *Paramount Pictures*, 334 U.S. 131, 159. These are, of course, some of the central terms of the government's present consent decree against ASCAP.

Petitioner maintains that individual arrangements are simply not practical (Pet. 17). We agree that in most, if not all, instances this is true.[8] But this simply reinforces the justification for a blanket licensing system. Indeed, petitioner seems to suggest that ASCAP might constitute a lawful arrangement if it offered a greater variety of license packages, for example, western, religious, rock, classical, etc. (Pet. 7). Thus, petitioner concedes that the issue is not the validity of ASCAP's existence in the field of licensing recorded music, or the legitimacy of its bulk licensing as such in this field, but rather the size of the package ASCAP offers.

[8] Broadcasters with special needs may find it feasible to deal directly with publishers.

Alternatively, petitioner argues that its objections might be avoided if ASCAP were required to negotiate licenses with recording companies so that the performance rights would be sold at the source, *i.e.*, anyone acquiring ownership of the record would also own the right to perform it publicly for profit.[9] But there is nothing in the record to indicate that recording companies have ever sought such rights, that they have any economic incentive to do so, or that ASCAP has ever attempted to prevent them from obtaining such licenses. The reasons for this readily suggest themselves. Such companies earn their income from the sale of recordings, not from the public performance of the recording for profit. Moreover, the value of the performing right for a single song cannot be determined until it has been exposed to the public and the extent of demand for its playing can be assessed. Finally, since the same record may be used at home or in the broadcast studio, the price of the performing right would be reflected in the price of the record sold to the general public, thus requiring the record-buying public to subsidize the operating

[9] Such an arrangement has been adopted under the ASCAP decree with respect to the performance of music incorporated into the sound track of motion pictures distributed to movie exhibitors. Prior to 1948 ASCAP required exhibitors to obtain a license from it in order to play the music on the sound track of films they had rented. The 1950 amendment to the decree forbade this, thus requiring ASCAP to negotiate with the motion picture producers a license for public performance of the music which would operate to the benefit of anyone renting the film. See Timberg, *The Antitrust Aspects of Merchandising Modern Music*, 19 Law & Contemp. Prob. 294 (1954).

costs of radio stations which broadcast the musical compositions.

If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. We do not suggest that a private litigant has the burden of conclusively establishing the feasibility of such alternatives. Rather, in the light of the stipulated facts which show the practical need for bulk licensing in order for the market to function (see *supra*, p. 5), petitioner should at least have come forward with evidence demonstrating a reasonable possibility that alternative methods are feasible. That has not been done.

There is no question, of course, that the combination of copyright holders which ASCAP represents requires the closest scrutiny under the antitrust laws. Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. Because of the competitive threat represented by ASCAP, the United States sued it under the Sherman Act in 1941 and obtained a consent decree against it. As conditions change [10] or abuses are

[10] For example, the difficult problem of accounting for millions of separate performances each year may ultimately be solved by developments in computer technology. Such a change might warrant a completely new approach to the operation of the market for performance rights to recorded music.

disclosed, it may become necessary, as in 1950 (see, pp. 3-4, *supra*), for the government to seek modifications of that decree or to file suit for additional relief.

Private parties, of course, always have the option of seeking relief in their own behalf, notwithstanding any consent decree accepted by the government. We believe, however, that nothing has been shown on this record to warrant a finding that the antitrust laws have been violated. Accordingly, the court below appears to have reached the correct result.[11]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

HOWARD E. SHAPIRO,
Attorney.

DECEMBER 1967.

[11] What we say here applies only to the record in this case. Other ASCAP licensing activities are not involved and we take no position concerning them.

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FOR ARGUMENT

Supreme Court, U. S.
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Nos. 77-1578 and 77-1583

In the Supreme Court of the United States

OCTOBER TERM, 1978

BROADCAST MUSIC, INC., ET AL., PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The brief filed by the United States in this case reproduced, as an appendix, a brief filed in this

Court in *K-91, Inc.* v. *Gershwin Publishing Corp.*, No. 147, October Term, 1967. We have discovered that, because of a printer's error, two pages were omitted from the reproduction of that brief. We therefore attach as an appendix to this memorandum the full "Discussion" section of the *K-91* brief, including the two pages that previously were omitted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

APPENDIX

DISCUSSION

In substance, the question presented by the present petition is whether the bulk-licensing methods by which ASCAP's members market rights to perform publicly for profit recordings of their copyrighted musical compositions violate the antitrust laws. The court of appeals concluded that no antitrust violations were shown, after finding "that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree" (Pet. App. 18), and pointing out that music users may make individual arrangements with separate copyright holders if they wish, instead of dealing with them through ASCAP. In the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions—the result below, in our view, seems correct, and review by this Could not not appear to be warranted.

We do not understand the court below to have held that the consent decree now in force against ASCAP of itself makes lawful what would otherwise be unlawful (see Pet. App. 17-18). To the extent that ASCAP's activities, whether under the consent decree or unregulated, violate the antitrust laws, both the United States and private parties have a continuing remedy under the Sherman Act. Nothing in the holding below is to the contrary.

The existence and operation of agencies which collectively license the right to perform musical works

raise difficult problems under the antitrust laws. See, *e.g.*, *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y.); *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn.); *Affiliated Music Enterprises* v. *SESAC Inc.*, 60 F. Supp. 865, 875 (S.D.N.Y.). Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the relevant economic setting—here, the relationship between the business of recorded music and commercial broadcasting.

The sale of the right publicly to perform for profit a copyrighted musical work, through the playing of a record of the composition, is not wholly comparable to the sale of a manufactured product or the sale of a license to make, use or vend a patented product. Compare *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, with *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, 197. Broadcast of a recorded song over the radio is an intangible, audible event of a few minutes' duration. The resulting public "performance" for profit is not an alienable object like a copyrighted film or the phonograph record itself. The "performance" cannot be owned or transferred; it occurs only while the recording is being played over the air. Each playing is a separate performance subject to the copyright

holders' control over performing rights. Congress has made that right wholly separate from the right to reproduce and sell recordings of the copyrighted work (17 U.S.C. 1(e)).

The exclusive right to make (*i.e.*, copy) and vend copyrighted works is analogous to the right to make and vend patented products, and the same antitrust considerations have been applied to abuses of these exclusive rights as are applied to patent rights. *United States* v. *Loew's Inc.*, 371 U.S. 38; *United States* v. *Paramount Pictures*, 334 U.S. 131. However, whatever the legality of a combination of copyright holders to pool and jointly sell these incidents of their copyrights, performing rights for recorded music are, for obvious practical reasons, subject to somewhat different considerations.

The market for the evanescent right to broadcast a piece of recorded music is completely unlike the market for the right to perform the music in a commercial film's sound-track. Cf. *Alden-Rochelle*, *supra*, and *Witmark*, *supra*. Recordings are available everywhere to everyone, without distinction between home and commercial users, and the copyright holders have no voice in their sale. Once the holder has agreed to a recording of his work, it may be recorded by any company upon the giving of appropriate notice subject to the payment of the royalty of two cents per record (17 U.S.C. 1(e)). There are over 1,400 AM and 1,744 FM broadcasting stations located in every part of the United States (FCC Ann. Rep., pp. 106, 110 (1966)). Most of these stations broadcast re-

corded music for a substantial part of their operating day. They may acquire ownership of any recording they wish, and in the present state of technology there appears to be no effective means by which the enormous number of separate performances broadcast each year by commercial stations across the nation can be accounted for by copyright holders. Nor is it feasible for these stations to deal on a "per piece" basis with the thousands of individual copyright holders across the country in order lawfully to exploit recorded music, for the value of the right to broadcast a single performance of one recorded composition is far less than the cost of negotiating a separate license. It would appear, therefore, that there must be some form of centralized licensing system which serves the mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished.

The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344; *Chicago Board of Trade* v. *United States*, 246 U.S. 231. This case appears to us to involve such a situation. The extraordinary

number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year,[7] the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

If this market is to function at all, there must be —at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them. ASCAP's repertory includes a large percentage of the nation's copyrighted music. This results in a situation which can lead to abusive discriminations among users, if not effectively regulated. Thus, it is quite reasonable to require ASCAP to offer the same terms to all users similarly situated. And because users' requirements for separate pieces are continuous, the volume of demand enormous, and the value of each single performance small, separate negotiations on a per piece basis are not practicable. There is simply no escaping, as a practical matter, the licensing of the works in bulk. Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the indi-

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[7] Individual stations broadcast thousands of playings of musical compositions each year, and ASCAP has in excess of one million musical compositions in its repertory at any one time (see Pet. App. 6).

vidual copyright holder should also be preserved for those who might be able to take advantage of it. Therefore, the right to license in bulk delegated to the collective agency must be nonexclusive, so that users have the option of choosing a blanket license or negotiating with individual copyright holders. Cf. *United States* v. *Paramount Pictures*, 334 U.S 131, 159. These are, of course, some of the central terms of the government's present consent decree against ASCAP.

Petitioner maintains that individual arrangements are simply not practical (Pet. 17). We agree that in most, if not all, instances this is true.[8] But this simply reinforces the justification for a blanket licensing system. Indeed, petitioner seems to suggest that ASCAP might constitute a lawful arrangement if it offered a greater variety of license packages, for example, western, religious, rock, classical, etc. (Pet. 7). Thus, petitioner concedes that the issue is not the validity of ASCAP's existence in the field of licensing recorded music, or the legitimacy of its bulk licensing as such in this field, but rather the size of the package ASCAP offers.

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If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk

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licensing of recorded music, a different case would be presented. We do not suggest that a private litigant has the burden of conclusively establishing the feasibility of such alternatives. Rather, in the light of the stipulated facts which show the practical need for bulk licensing in order for the market to function (see *supra*, p. 5), petitioner should at least have come forward with evidence demonstrating a reasonable possibility that alternative methods are feasible. That has not been done.

There is no question, of course, that the combination of copyright holders which ASCAP represents requires the closest scrutiny under the antitrust laws. Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. Because of the competitive threat represented by ASCAP, the United States sued it under the Sherman Act in 1941 and obtained a consent decree against it. As conditions change [10] or abuses are disclosed, it may become necessary, as in 1950 (see, pp. 3-4, *supra*), for the government to seek modifications of that decree or to file suit for additional relief.

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[10] For example, the difficult problem of accounting for millions of separate performances each year may ultimately be solved by developments in computer technology. Such a change might warrant a completely new approach to the operation of the market for performance rights to recorded music.

Private parties, of course, always have the option of seeking relief in their own behalf, notwithstanding any consent decree accepted by the government. We believe, however, that nothing has been shown on this record to warrant a finding that the antitrust laws have been violated. Accordingly, the court below appears to have reached the correct result.[11]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR ALL-INDUSTRY RADIO MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR ALL-INDUSTRY RADIO MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE*

All-Industry Radio Music License Committee ("Radio Committee") submits this brief as *amicus curiae* in support of the judgment of the United States Court of Appeals for the Second Circuit rendered on August 8, 1977, to the extent stated in this brief.

The Radio Committee

The Radio Committee represents over 2,000 AM and FM local radio broadcasting stations in connection with the licensing of public performance rights of compositions in the ASCAP and BMI repertories.

Payments by local radio stations to ASCAP and BMI in the year 1977 exceeded $54 million—a sum representing a substantial portion of the total royalties paid to those organizations.

The Radio Committee has been in existence for 20 years. During that period it has negotiated with ASCAP and BMI with respect to licenses for the right of public performance of music in ASCAP's and BMI's repertories. Pursuant to the provisions of a consent decree, as amended ("1950 ASCAP Decree"), in *United States* v. *ASCAP*, 1950-51 CCH Trade Cas. ¶ 62,595 (S.D.N.Y. 1950), the Radio Committee participated in four proceedings on behalf of local radio stations to have the district court determine a reasonable fee for the performance rights of compositions in the ASCAP repertory: *Application of Marion Broadcasting Co.* (1959); *Application of Marion Broadcasting Co.* (1964); *Application of Capital Cities Broadcasting Corp.* (1972); *Application of Berkshire Broadcasting Co., Inc.* (1977).

The Government's Antitrust Proceeding Against ASCAP

In 1941 the Justice Department, challenging ASCAP's policy of requiring all users to take a blanket license and alleging that the practice of obtaining exclusive licenses from its members enabled ASCAP to exact arbitrary prices from licensees, commenced an antitrust action against

ASCAP. A consent decree entered March 4, 1941, required ASCAP to offer broadcasters per program licenses as well as blanket licenses. *United States* v. *ASCAP*, 1940-43 CCH Trade Cas. ¶ 56,104 (S.D.N.Y. 1941).

The 1941 decree was substantially amended by the 1950 ASCAP Decree. Among the changes effected by the amended decree was the inclusion of a provision (¶ IX) under which the court has the power to determine a reasonable fee when the licensee and ASCAP were unable to arrive at a negotiated fee.

The 1950 ASCAP Decree has many infirmities. For example, it has no provision for a license excluding non-network prerecorded programs, or for a license to perform specific ASCAP compositions absent specific consent of the ASCAP members. *See, United States* v. *ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir. 1964), *cert. denied*, 377 U.S. 997 (1964); *United States* v. *ASCAP (Application of National Broadcasting Co., Inc.)*, 1971 CCH Trade Cas. ¶ 73,491 (S.D.N.Y. 1970). Moreover, the decree contains no standards to be applied by the court in determining a reasonable fee. In fact, the court has never set a fee, the fee having always resulted from negotiations between the parties.

It was the failure of the 1950 ASCAP Decree to provide for a per use license that led to the instant litigation.

The Government's Antitrust Proceeding Against BMI

In 1941, at the time of the commencement of the antitrust proceeding against ASCAP, the Government also sued BMI under the Sherman Act, a proceeding which likewise resulted in a consent decree. *United States* v. *Broadcast*

Music, Inc., 1940-43 CCH Trade Cas. ¶ 56,096 (E.D. Wisc. 1941). In 1966 the Government entered into a new consent decree with BMI after an antitrust complaint had been filed in 1964. *United States* v. *Broadcast Music, Inc.*, 1966 CCH Trade Cas. ¶ 71,941 (S.D.N.Y. 1966). That decree likewise required BMI to offer blanket and per program licenses to local radio stations. There is no provision in the BMI decree, similar to that in the 1950 ASCAP Decree, vesting the court with the power to determine "a reasonable fee" for a BMI performing rights license.

SESAC Inc.

Although substantially all the compositions used by local radio stations are derived from the repertories of ASCAP and BMI, a minute percentage comes from SESAC, an organization which issues blanket licenses to local radio stations to perform compositions in its repertory. Although SESAC is not subject to any Government antitrust decree, its activities, according to a dictum contained in an opinion of the district court, are violative of the antitrust laws. *Affiliated Music Enterprises, Inc.* v. *SESAC, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd on other grounds*, 268 F.2d 13 (2d Cir. 1959).

The Interest of the Radio Committee

The Second Circuit, in the instant case, declared that the activities of performing rights organizations may be exempt from the strictures of the Sherman Act where a "market necessity" for the existence of a price-fixing organization is shown to exist. Local radio stations, which now are paying millions of dollars for performing rights to ASCAP, BMI and SESAC, may be adversely affected by that principle.

As we posit in Point III, the local radio business is different from the television network business. There is an obvious concern that a decision sustaining the Petitioners' position could be applicable to the local radio's relationship with the Petitioners; particularly as some of the arguments before this Court confuse the two businesses.

Moreover if this Court were to establish a market necessity exception to the *per se* illegality of price fixing activities of performing rights organizations, local radio would be at the mercy of those organizations. Utilizing the drastic penalty provisions of the United States Copyright Law (17 U.S.C. § 504), under which an infringer may be required to pay $100 or more for each infringing use of a copyrighted composition, the organization could make unconscionable demands upon local radio stations which would find themselves defenseless against such demands, except perhaps by boycotting the offending organization. Even such a boycott might be impermissible under the antitrust laws.

Hence, this Court's ruling in the instant case is a matter of vital concern to local radio stations, and it is for that reason that the instant *amicus curiae* brief is being submitted to this Court.

ARGUMENT

I

ASCAP's Blanket License Is a Price-Fixing Agreement and Is *Per Se* Illegal.

We submit that the Second Circuit's decision condemning the ASCAP blanket license as illegal *per se* under Section 1 of the Sherman Act is supported by a plethora of decisions of this Court holding that agreements among competitors to fix prices or otherwise to tamper with the pricing process are illegal *per se* under Section 1 of the Sherman Act. *E.g., United States* v. *Container Corp. of America,* 393 U.S. 333 (1969); *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.,* 273 U.S. 392 (1927).

It is immaterial to the finding of *per se* illegality that the prices set by the agreement may be reasonable. *United States* v. *Trenton Potteries Co., supra,* at 397-98; *United States* v. *Socony-Vacuum Oil Co., supra,* at 222. Nor is it relevant that the price-fixing agreement may have some alleged economic or social justification. Whatever the reason may be for the price-fixing arrangement, it is illegal *per se* and violative of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co., supra,* at 220.

In short, the rule of reason has no application to price-fixing combinations and cannot justify price-fixing agreements among competitors such as members of ASCAP whose compositions have been found to be substantially interchangeable.

II

There Is No Valid Basis for a Market Necessity Exception.

According to the brief for the United States, as *amicus curiae,* submitted in this case

> "there could be no acceptable 'market necessity' defense to activity that is unlawful *per se.* The reason for having *per se* rules is that it is necessary, at some point, to cut off further inquiry and to lay down clear principles that will govern even if they do not precisely fit some particular cases. It is not possible to entertain a 'market necessity' defense without discarding the idea of cutting off inquiry, that is, without discarding the idea of *per se* rules."

Although we differ with the Government in its conclusion that the ASCAP blanket license is not unlawful *per se,* we completely concur in the Government's rejection of the market necessity exception. We also agree with ASCAP's conclusion (brief pp. 31-37) that there is no valid basis for the market necessity exception.

The activities of ASCAP being *per se* unlawful, there can be no justification for ASCAP's price-fixing activities, whether or not there is a market need for blanket licensing. An exception based on market need would undermine the *per se* rule, requiring a court to embark on investigations which the *per se* rule, by its very nature, was intended to bar.

In short, the principles laid down in *Trenton Potteries* and its progeny make it clear that the pricing combination here involved is illegal *per se,* and the illegal nature of the arrangement is not changed by the fact that the price-

fixing combination may have arisen out of some market need.

III

The Court, in Deciding This Case, Should Recognize That the Record Before It Does Not Deal With Local Radio or Its Problems.

For the reasons above stated, we believe that ASCAP's activities are *per se* illegal and that there is no basis for a market necessity exception. Further, this Court, in reaching its decision in this case, will undoubtedly be cognizant of the fact that the evidence presented to the district court pertains to network television broadcasting and not to local radio stations. It should therefore avoid a decision which would give performing rights organizations a defense to their *per se* violations since the problems confronting local radio stations are substantially different from those of network television.

Were this Court to create a defense to price fixing by the performing rights organizations—whether or not under the guise of a "market necessity" concept—two immediate results would ensue:

First: The Court would perpetuate the present status of performing rights organizations despite the ever changing character of the music and broadcasting businesses. New approaches as well as new competition could therefore be foreclosed.

Second: As in any classical vertical monopoly situation, the possibility of local radio's being compelled to pay exorbitant license fees would be ever-present. As we have already noted, the fees charged by BMI and SESAC are not subject to any restraint. Again, although ASCAP's

activities are limited by the 1950 Decree, were this Court to hold that ASCAP's activities were not *per se* illegal ASCAP might claim that the consent decree should be vacated upon the ground that ASCAP is not violating the antitrust laws, and it should then be free to exact any fees it desires from local radio. These possibilities are exacerbated by the fact that the performing rights organizations may utilize the infringement provisions of the Copyright Law to compel the payment of license fees which are far in excess of the value of its repertory.

Consequently, the Court, in rendering its decision in this case, should recognize that since the record does not relate to local radio there should be no determination that the fees fixed by performing rights organizations with respect to local radio are justified on any basis.

CONCLUSION

Our submission, therefore, is that this Court should find that ASCAP and BMI are illegal price-fixing combinations and should reject any type of market necessity exception.

Respectfully submitted,

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December 11, 1978.

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE ALL-INDUSTRY TELEVISION MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE*

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---

BRIEF FOR THE ALL-INDUSTRY TELEVISION MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE*

The All-Industry Television Music License Committee submits this brief as *amicus curiae*, pursuant to Rule 42 of the Rules of this Court, in support of respondent, Columbia Broadcasting System, Inc. ("CBS"), urging affirmance of

the judgment of the Court of Appeals for the Second Circuit.[1] The court of appeals ruled that the blanket licensing arrangements of the petitioners, American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), are *per se* unlawful under the antitrust laws and constitute misuse of the copyrights held by those organizations' members and affiliates.[2]

Interest of the *Amicus Curiae*

The All-Industry Television Music License Committee ("Committee") represents the interests of the vast majority of local television stations[3] throughout the country in connection with the procurement of music performance licenses from ASCAP and BMI. The Committee represents, for these purposes, the owners of over 500 of the more than 700 local television stations in commercial operation. The stations represented by the Committee consist of both network-affiliated stations, *i.e.*, stations which receive a major portion of their programming from one or more of the three national television networks ("networks") and stations operating independently of a network.[4]

1. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers*, 562 F.2d 130 (2d Cir. 1977). The opinion of the court of appeals appears as Appendix A to ASCAP's petition for a writ of certiorari.

2. This brief is submitted upon the written consents of all parties, copies of which are filed herewith.

3. "Local television station" as used herein refers to any commercial television station licensed by the Federal Communications Commission, excluding the 15 television stations owned and operated by the three national television networks.

4. Of the approximately 710 local television stations currently in commercial operation, some 610 are network-affiliated and some 100 operate independently.

The blanket licenses successfully challenged below by CBS are identical in essential nature to those which are offered by ASCAP and BMI (to the exclusion of other forms of licenses) to the local television stations. The Committee respectfully submits that the impact of those licenses upon local television stations (including Committee members), which stations' royalty payments constitute ASCAP's and BMI's largest source of revenue,[5] has been even more detrimental than their impact upon the networks and demonstrates even more clearly the pernicious and *per se* unlawful nature of the restraints underlying those licenses.

The antitrust claims of all local television stations (including Committee members) against ASCAP, BMI and their respective members and affiliates are now being litigated in a class action in the Federal District Court for the Southern District of New York.[6] The stations reluctantly resorted to the self-help of their own private antitrust action (seeking solely injunctive relief) only when ASCAP and BMI continued in their refusal to offer alternatives to their unlawful blanket licenses.

This *amicus curiae* brief is filed so that the Court may be made aware of the circumstances under which the ASCAP and BMI blanket licenses have impacted upon and become self-perpetuating for virtually the entire television industry. These circumstances, we submit, are relevant to the issues before the Court, for they underscore

5. *See* Petitioners ASCAP Supplemental Brief for Certiorari at 3.

6. *Buffalo Broadcasting Co., et al.* v. *American Society of Composers, Authors and Publishers, et al.*, 78 Civ. 5670 (S.D.N.Y., filed November 27, 1978).

the court of appeals' finding that the purpose and effect of the blanket licenses have been to eliminate price competition, as well as highlight those licenses as classic restraints of trade long held *per se* unlawful by this and other courts.

The ASCAP and BMI repertories contain the copyrighted musical compositions of virtually all American composers, authors and publishers of music. The television networks' blanket licenses with ASCAP and BMI entitle network-affiliated local television stations to broadcast, without further license from ASCAP and BMI, such music in the ASCAP and BMI repertories as may be contained in the network programming carried by the stations.[7] The local television stations must themselves secure (subject to certain minor exceptions) music performance licenses to cover copyrighted music broadcast in non-network programming, *i.e.*, the remaining programming of network affiliates, and all programming of independent stations.

The only licenses offered the local television stations by ASCAP and BMI to cover the music broadcast in the stations' non-network programming have been blanket licenses, which operate in similar fashion to the network blanket licenses. The blanket licenses require the local stations to obtain, and pay for, music performance rights in all of the music in ASCAP's and BMI's respective repertories, without regard to the extent to which such music is needed,

7. The network-affiliated stations' affiliation agreements with the networks provide that approximately 50 percent of the networks' license payments to ASCAP and BMI are to be reimbursed to the networks by the local stations.

desired, or used. Moreover, each local station's payment to ASCAP and BMI under its blanket license is determined by a stated percentage of all revenues derived by that station from all programs covered by the license. Since revenues are most often attributable to factors having nothing to do with the extent or nature of music use in the station's programming, the royalties paid are unrelated to the amount or value to a given station of the ASCAP or BMI music, if any, broadcast.

The cost of music performance rights in the local television stations' non-network programming is accordingly uniquely immune from the competitive pressures of the marketplace. Moreover, music is the only cost element over which the television stations can exercise no control and which they cannot predict in advance (since music performance license fees are computed based on each station's year-end revenue data).

The anticompetitive benefits in the form of elimination of price and other competition among competing copyright proprietors[8] derived by ASCAP, BMI and their respective members and affiliates from the imposition of blanket licenses of the type described were fully recognized by the court of appeals and the licenses were accordingly condemned as *per se* unlawful. This elimination of price and other competition through the device of the blanket licenses becomes yet more apparent when one examines the basis for the organizations' insistence that such licenses, in the case of the local television stations, cover the stations' non-net-

8. *See* discussion, *infra*, in Point C of Argument.

work "pre-recorded" programming[9] as well as the stations' locally-produced (*e.g.*, news and sports) programming.[10] Those reasons are simple. As more fully described below, by so acting, the petitioners have guaranteed the avoidance of competitive mechanisms already in place which would permit free negotiations over performance rights to take place and which would make blanket licenses unnecessary for many—if not most or all—local television stations.

Television performance rights for music contained in pre-recorded programming, which constitutes the major portion of non-network programming,[11] would normally be obtained by the producers of such programming at the same time those producers obtain other rights in the very same musical compositions in direct dealings with individual

9. A "pre-recorded" program as used herein is any motion picture film, video tape or other recorded or transcribed work created for, or otherwise capable of being broadcast on, television.

10. Technically, ASCAP and BMI have offered an alternative form of blanket license to the local television stations, under compulsion of consent decrees with the United States. This "per-program" (and, in the case of BMI, "per-programming period") license also covers the entire ASCAP and BMI repertories, but is applied to individual programs (or program periods) utilizing ASCAP and BMI music. Rather than pay ASCAP and BMI a percentage of revenues from all programming, a station choosing a per-program license would have to pay ASCAP and BMI a significantly greater percentage of revenues realized from those programs utilizing ASCAP and BMI music. Because of the disproportionately high levels at which payments have been set by the defendants under the per-program license, and the onerous reporting requirements accompanying its use, virtually no local television stations have entered into this form of blanket license.

11. Generally, all but two to three hours of the typical local television station's daily non-network programming is devoted to pre-recorded programming, which consists of feature movies and a variety of syndicated programs. The remaining two to three hours are devoted to locally-produced programs such as news, sports coverage and talk shows.

copyright proprietors.[12] For without being able to offer those who license the programming the performance rights to the music contained in it (all of the other rights to which programming having been obtained by the producer), the producer would have a product which could not be marketed.

ASCAP and BMI, and their members and affiliates, have instead arranged, through explicit contractual provisions with both the producers and the local stations,[13] and through uniform and undeviating courses of dealing,[14] that such performance rights will not be licensed to the producers "at the source," but, rather, are to be licensed by the local stations. The producers, knowing that the local stations will have obtained blanket licenses to cover such performances, and that there is no point in paying twice for the same rights,

12. The producers must obtain "synchronization" (*i.e.* recording) rights in copyrighted music to permit the use of such music in the sound tracks of the pre-recorded programming. These rights are typically obtained through negotiations with the Harry Fox Agency acting as the copyright proprietors' agent. The producers also obtain rights through such negotiations permitting motion picture theatre (but not television) performances of copyrighted music in motion picture films.

13. The copyright owners' standard contracts with producers of pre-recorded programming, granting synchronization and motion picture theatre performance rights in specified compositions, withhold the grant of performance rights for television, and require instead that the producer provide its programming only to local television stations which have obtained performance licenses.

In addition, the ASCAP and BMI blanket license agreements with local television stations include a provision which obligates the stations to pay for music performance rights even in programming as to which the producer itself may have obtained such rights.

14. The more than 70,000 composers, authors and publishers of music whose works are licensed by ASCAP and BMI all act in a consistent fashion with respect to the licensing of performance rights in pre-recorded programming. That is, all rights other than television performance rights are licensed to producers of such programs.

acquiesce in these arrangements. All negotiation between ASCAP members and BMI affiliates and program producers over such licenses (the only point in time when such competition could exist) is thereby eliminated in favor of the extraction of the price of performance rights as part of the ASCAP and BMI blanket licenses (at a point in time when the music is irreversibly integrated into the pre-recorded program and no competition can take place).

The "splitting" of the licensing of synchronization and television performance rights, facilitated by the existence of the blanket licenses, not only eliminates any possibility of competition in the licensing of television performance rights in pre-recorded programming, but also enables the blanket licenses to become self-perpetuating.

The selection of music in pre-recorded programming is accomplished by the producers by the time they obtain synchronization rights. No bargaining leverage would accordingly remain with a local television station over the price to be paid for performance rights in the same music in any negotiation with individual copyright holders, since those rights would have to be obtained by the station at any price in order for the station to broadcast the programming. Thus, the blanket license becomes the sole available alternative, thereby locking the stations into those licenses and effectively foreclosing competition over performance rights.[15]

15. The "non-exclusive" nature of the ASCAP (but not BMI) blanket licenses (*i.e.*, the theoretical availability of a direct license alternative), repeatedly cited by the petitioners, is readily seen to be illusory by virtue of arrangements such as "splitting," which assure reliance upon the blanket licenses and render direct licensing totally impractical.

Absent the requirement imposed upon the stations of licensing performance rights in non-network pre-recorded programming, the sole remaining programming for which music performance licenses would be necessary for the local stations would be the two to three hours a day of locally-produced programming. Given the minimal use of music in such locally-produced programming,[16] and the stations' ability in any event to select such music as may be used, the stations could feasibly explore alternatives to obtaining blanket licenses from ASCAP and BMI, for example, using music only in the public domain or music specially purchased by (including performance rights thereto) the local station. Such efforts, at present, would be futile and effectively result in double payments for music, since, due to the above-described "splitting" practices, the stations must in any event obtain, and pay for, blanket licenses covering all of their programming.

Through these practices, ASCAP, BMI, and their members and affiliates have both eliminated competition in the conferral of performance licenses in music in pre-recorded programming and augmented the coverage of, and ensured the local stations' reliance upon, the ASCAP and BMI blanket licenses. The ability of ASCAP and BMI and their members and affiliates to insulate themselves from competition, to force users into blanket licenses and to extract license fees having little or no relation to the value of that music which is used demonstrates the pernicious and bla-

16. Many such programs, such as news and sports coverage, may use no music at all.

tantly anticompetitive intent and effect of the blanket licenses, and their *per se* unlawful nature.[17]

It understates the case to suggest, as the Government does, that the performing rights societies are capable of engaging in practices which could place users such as the local television stations "in a position that gives performing rights societies, and their members, substantial opportunities to misuse their economic position."[18] The symbiotic relationship between the blanket licenses and the splitting of synchronization and performance rights represents as clear an example of "misuse of economic position" as could be imagined.

The "misuse of economic position" and elimination of price competition which has occurred is made apparent by an examination of the license fees which have been paid by the stations for ASCAP and BMI licenses.

The local television stations have been the single largest source of royalties for ASCAP and BMI, notwithstanding that they are far from the largest users of ASCAP and BMI music. Local television station payments to ASCAP and BMI in 1976 totalled over $40 million[19] and had, by

17. It is indeed ironic that the petitioners' efforts at justification of the blanket licenses revolve around alleged transaction cost efficiencies derived therefrom and the "instantaneous access" to compositions which the licenses provide. *See* Brief for Petitioners ASCAP at 8; Brief for Petitioners BMI at 21-24. In fact, the "splitting" practices not only have the effect of eliminating competition, but further, they *increase* transaction costs and create a need for instantaneous access where none would otherwise exist.

18. Brief for the United States as *Amicus Curiae* at 24.

19. This amount is exclusive of network-affiliated stations' contributions to the networks.

that year, increased by over 56 percent from the levels of payments to those organizations in 1972. Indeed, while payments to ASCAP and BMI were so increasing during this period, the stations' minutes of usage of ASCAP and BMI music were actually declining. These facts constitute a dramatic demonstration of the unresponsiveness of ASCAP and BMI to market forces.

The Committee respectfully suggests that the manner in which the local television stations have been disadvantaged at the hands of the petitioners represents a dramatic affirmance of the soundness of the findings of the court of appeals that the blanket licenses constitute *per se* illegal price-fixing arrangements.

Summary of Argument

The ruling of the court of appeals that the ASCAP and BMI blanket licenses constitute price-fixing arrangements, *per se* unlawful under the Sherman Act, was correct and should be affirmed. That opinion is consistent with earlier precedents in this and other courts dealing with price-fixing arrangements generally and with ASCAP's and BMI's blanket licenses in particular.

Examination of the purpose and effect of the ASCAP and BMI blanket licenses, as evaluated by the court of appeals, and as reinforced by the impact of those licenses on local television stations, affirms the soundness of the lower court's ruling.

The petitioners' efforts to justify their activities under the "rule of reason" represent an impermissible attempt to eviscerate cardinal principles relating to the treatment

of price-fixing activities under the antitrust laws. The Government's position that the petitioners' activities should be evaluated under the rule of reason is equally at odds with this Court's and the Government's own prior pronouncements with regard to the proper treatment of price-fixing arrangements.

ARGUMENT

The ASCAP and BMI Blanket Licenses Are *Per Se* Unlawful.

A. The Opinion Below

The Court of Appeals for the Second Circuit ruled that the ASCAP and BMI blanket licenses constitute *per se* unlawful price-fixing arrangements under the antitrust laws of the United States.[20] In reversing the district court's dismissal of the Complaint,[21] the court of appeals emphasized the fundamental principle that

> "... when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained." 562 F.2d at 136.

The court properly reasoned that

> "... even if the single price is *reasonable*, the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to

20. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers*, 562 F.2d 130 (2d Cir. 1977).

21. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers*, 400 F. Supp. 737 (S.D.N.Y. 1975). The opinion of the district court appears as Appendix B to the ASCAP petition for a writ of certiorari.

> that member of the combination for his composition. His distributive share of the common royalties may be greater than the royalty he would receive in a free market. In such case, even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940).
>
> "There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his own particular composition. . . ." *Id.* (emphasis in original).[22]

In reaching its result, the court of appeals followed an appropriate and traditional analytical framework. In holding, after a review of the record, that "[t]he blanket license dulls [the copyright owners'] incentive to compete," *id.* at 139, the court made the very judgment about "the competitive significance of the restraint," *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), that this Court has stated is required under the Sherman Act.

In *Professional Engineers*, it was recognized that the proper analysis—an initial evaluation of the competitive significance of the restraint—is not altered whether the court undertakes a *per se* or rule of reason analysis. 435

22. The court also concluded that the aforedescribed pooling of rights and revenues by ASCAP and BMI constituted copyright misuse. *Id.* at 141 n.29.

U.S. at 690-92. It is accordingly clear that, in first analyzing the restraint and then concluding that it was *per se* unlawful price-fixing, the court of appeals performed precisely the analysis mandated by *Professional Engineers*.

The court of appeals' conclusion that the blanket licenses were properly condemned as price-fixing is consistent with earlier views of this and other courts as to the legality of those activities. The efforts by both petitioners and the Government somehow to exempt the challenged activities from price-fixing doctrine reflect nothing other than attempts to repudiate these settled principles.

B. General Principles Relating to Price-Fixing

This Court has long recognized that agreements among competitors to fix or stabilize prices, to eliminate or limit price competition, or otherwise to tamper with the pricing process are *per se* unreasonable and thus unlawful under Section 1 of the Sherman Act. *United States* v. *Container Corp.*, 393 U.S. 333 (1969); *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

The "nature and necessary effect" of such arrangements are so inherently anticompetitive that "no elaborate study of the industry is needed to establish their illegality." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). *See also Northern Pacific Railway, supra*, 356 U.S. at 5 (price-fixing agreements are illegal *per se* because of their "pernicious effect on competition and lack of any redeeming virtue").

Under this analysis, as the court below recognized, it matters not that the prices set by agreement may be "reasonable." *See Trenton Potteries, supra*, 273 U.S. at 397 ("[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow"). *See also Socony-Vacuum, supra; United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Nor is it relevant to the disposition of such cases that the agreement may have permitted some forms of price competition to continue. *See Container, supra*, 393 U.S. at 337; *Socony-Vacuum, supra*, 310 U.S. at 224-26 n.59.

Finally, a "fixed" price pursuant to agreement need not take the form of a specific, established price. All that is required is that the agreement "tampers," "interferes with," or "chills" the setting of prices by free market forces. *Professional Engineers, supra*, 435 U.S. at 692; *Container, supra*, 393 U.S. at 337;[23] *Socony-Vacuum, supra*, 310 U.S. at 223.

As the *per se* rule implies, it is entirely inappropriate to analyze any purported justifications for a price-fixing scheme, once it has been determined that the activity involved does, in fact, constitute price-fixing. In *Socony-Vacuum, supra*, 310 U.S. at 226 n.59, this Court noted that

> "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."

23. As this Court emphasized in *Container*: "Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." 393 U.S. at 338.

See also Container, supra, 393 U.S. at 337; *Trenton Potteries, supra,* 273 U.S. at 397-98. Thus, "rule of reason" analyses are inappropriate as to any arrangement tampering with price competition.[24]

This Court has made equally clear that whatever the standard for evaluating particular conduct—*per se* or rule of reason—"the purpose of the analysis is to form a judgment about the competitive significance of the restraint," and "not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *Professional Engineers, supra,* 435 U.S. at 692. Since the earliest days of the Sherman Act, it has been held impermissible for the courts to second-guess the validity of the fundamental premise embodied in the Sherman Act, that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *Northern Pacific Railway, supra,* 356 U.S. at 4. Such an analysis is not an undertaking for the courts, by "judicial legislation," or otherwise. *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290, 340 (1897).

It is therefore impermissible for a court to attempt to legitimize restraints of trade based on its view that the

24. The contrasting treatment to be accorded price-fixing, as opposed to other types of agreements, was made clear most recently in *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977), where this Court, although holding that vertical territorial and customer restrictions should be analyzed under a rule of reason, nevertheless emphasized:

> "[W]e are concerned . . . only with non-price vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." *Id.* at 51 n.18.

underlying legislation is unwise, *Standard Oil Co.* v. *United States,* 221 U.S. 1, 65 (1911), or that, "because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition," *Professional Engineers, supra,* 435 U.S. at 689.

The foregoing principles were most recently reiterated by this Court in *Professional Engineers,* where an association of professional engineers sought to justify an "ethical" rule forbidding its members from submitting competitive bids to prospective customers. The Government contended that the effect of the rule was the elimination of price competition among the members. The association's response was that the rule was aimed at "forestalling the public harm which might be produced by unrestrained competitive bidding," 435 U.S. at 687, and that any restraint on price competition imposed by the rule was justified in order to avoid deceptively low bids, with consequent inferior work and "risk to the public safety and health." *Id.* at 693.

The cornerstone of the Court's analysis was the principle that the antitrust laws "unequivocally foreclose . . . an inquiry into the reasonableness of the prices set by private agreement." *Id.* at 689. Finding that "no elaborate industry analysis [was] required to demonstrate the anticompetitive character of such an agreement," the Court held that "[o]n its face" the agreement to refrain from competitive bidding was a price-fixing arrangement unlawful *per se. Id.* at 692-93. The Court thus rejected out of hand the association's attempt to justify the practice under the

rule of reason, noting that having found price-fixing, "[the] Court has never accepted" an argument that it can be justified under a rule of reason because of threats to public safety or the ethics of a profession. *Id.* at 694. Such efforts at justification, according to the Court, amount to "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695. Said the Court:

> "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Id.*

C. The ASCAP and BMI Blanket Licenses Are Price-Fixing Arrangements.

The application of the foregoing principles to the activities of ASCAP, BMI and their respective members and affiliates demonstrates that the blanket licenses offered to the networks, the local television stations, and other users, constitute *per se* unlawful price-fixing agreements. The district court,[25] in a finding affirmed by the court of appeals,[26] noted that "musical compositions are substantially interchangeable and that for any proposed use there are several, if not scores, of compositions which are equally suitable." In other words, the proprietors of copyrighted

25. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers,* 400 F. Supp. 737, 752 (S.D.N.Y. 1975).

26. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers,* 562 F.2d 130, 136 (2d Cir. 1977).

musical compositions are competitors in the licensing of such compositions to various users.[27]

The contractual arrangements whereby copyright proprietors grant ASCAP and BMI the right to license performance rights to their musical compositions, whereby ASCAP and BMI establish a single price for the licensing in bulk of all the copyright owners' works, and whereby the copyright owners are remunerated based not on the prices the performances of their music would command in the marketplace, but on artificial distribution formulae and the proceeds of the blanket licenses, have the obvious effect (as noted by the court of appeals) of reducing, if not totally eliminating price (as well as other) competition among the individual copyright owners for the licensing of music performances. The arrangement, in such circumstances, is clearly one which "tampers with price structures," *Socony-Vacuum, supra,* 310 U.S. at 221, and "interfere[s] with the setting of price by free market forces," *Container, supra,* 393 U.S. at 337.[28] In these lights, the court of appeals properly noted that the theoretical availability of licenses from individual copyright holders (at least in the case of ASCAP) is irrelevant:

> "[E]ven if the members of the combination are willing not only to join in the blanket license, but also to

27. *See also* Brief for the United States as *Amicus Curiae* at 16 ("ASCAP [and BMI] undoubtedly . . . [are] association[s] composed of persons who otherwise are competitors").

28. Where, moreover, the effect of such licenses is to give the "performing rights' societies, and their members, substantial opportunities to misuse their economic position," Brief for the United States as *Amicus Curiae* at 24, such as the "splitting" of synchronization and performance rights in pre-recorded programming, *see* discussion, *infra,* at pp. 25-27, the pernicious nature of those licenses, and their interference with free market forces becomes all the more evident.

> sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940)." 562 F.2d at 136.

That ASCAP and BMI may be characterized as "common selling agents" of competitors' products does not alter the conclusion as to the *per se* illegality of the blanket licenses. This is made clear by this Court's decision in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), which involved the antitrust legality of a joint operating agreement between two competing newspapers in Tucson, Arizona.

The agreement provided, among other things, for the selling of subscriptions and advertising by a joint operating company, at rates set jointly (including a "combination rate"), as well as for the pooling of all profits realized, pursuant to an agreed-upon ratio.

The Government's brief to the Court[29] argued for the application of the *per se* rule to the agreement in question, on the following grounds:

First, the agreement "plainly resulted in price fixing, since there was a complete delegation of power over advertising and circulation rates to the operating company."[30] Quoting language from *United States* v. *Masonite Corp.*, 316 U.S. 265, 276 (1942), the Government urged that " '[t]he

29. Brief for Respondent, *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969).

30. *Id.* at 22.

> fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action.' " *Id.*[31]

Second, the Government argued that the agreed-upon, "inflexible ratio by which the joint profits would be distributed" had the effect of "sharply reducing the economic incentive for competing for circulation and advertising revenues." *Id.* at 22-23. Such profit pooling, the Government contended, "destroys every motive for competition." *Id.* at 23. Citing previous cases which had found profit pooling between competitors to be unlawful, *e.g.*, *United States* v. *Paramount Pictures*, 334 U.S. 131, 149 (1948) (" '[c]learer restraints of trade are difficult to imagine' "); *Northern Securities Co.* v. *United States*, 193 U.S. 197, 328 (1904),

31. The *Masonite* case involved patent licensing agreements among competing patent owners whereby one member of the group was vested with the authority to fix prices for the product manufactured by use of the patents. This Court held the fact that the member setting the prices did not consult with the other patent owners to be irrelevant to the finding of illegality. It further held:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual and potential competitors, is a powerful inducement to abandon competition . . . . The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*. If it were sanctioned in this situation, it would permit the patentee to add to his domain at public expense by obtaining command over a competitor. He would then not only secure a reward for his invention; he would enhance the value of his own trade position by eliminating or impairing competition. That would be no more permissible than a contract between a copyright owner and one who has no copyright, or a contract between two copyright owners or patentees, to restrain the competitive distribution of the copyrighted or patented articles in the open market." 316 U.S. at 281-82.

the Government contended that the arrangement was *per se* illegal. *Id.* at 23.[32]

It is significant to note the Government's response to the defendant newspapers' contention that price-fixing and profit pooling were required in order to enable both newspapers to stay in business. Such an argument, said the Government,

> "amounts to a plea that claims of business necessity can justify *per se* violations of the Sherman Act. Guided by considerations of effective antitrust enforcement, this Court (see *United States* v. *Trenton Potteries Co.*, 273 U.S. 392) has repeatedly declined to entertain such pleas in the past. No reason exists why it should apply a different approach here." *Id.* at 38.

To the argument that certain social benefits would flow from permitting the arrangement to continue (*e.g.*, the fostering of first amendment values through a diversity of news and editorial policies), the Government replied:

> "We do not attempt here to evaluate these conflicting economic and social views, and we do not believe the Court should do so. This Court has repeatedly rejected claims of ruinous competition or even improvement in distribution of a product as justifications for price-fixing, profit pooling, or market allocation agreements. See *United States* v. *Masonite Corp.*, 316 U.S. 265, 276; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597-598. Congress has determined that the free play of economic forces is the best assurance of the allocation of resources to social advantage.

32. The Government further argued that the agreement between the papers not to compete with the operating company, "particularly when coupled with a price fixing arrangement," also was illegal *per se*. *Id.*

> *Northern Pacific R. Co.* v. *United States*, *supra*, 356 U.S. at 4; see *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 468." *Id.* at 46-47.

This Court adopted the Government's view of the case and held that the joint operating agreement constituted price-fixing, profit-sharing and market division arrangements *per se* unlawful under Section 1:

> "The §1 violations are plain beyond peradventure. Price fixing is illegal *per se*. . . . Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act." 394 U.S. at 135.

Indeed, the Court concluded:

> "The joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field." *Id.* at 136.

The relevance of *Citizen Publishing* is clear. The activities there condemned as *per se* unlawful are, upon analysis, of no essential difference from the facts presented by the ASCAP and BMI licensing arrangements. While ASCAP and BMI do not set the price for the licensing of single compositions (since they each refuse to offer such licenses), by offering a blanket license setting one price for all compositions, "price competition among members of ASCAP [and BMI] is eliminated as surely as if the rate for each performance were fixed at the outset."[33]

33. Note, *CBS* v. *ASCAP*: *Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783, 784 (1978).

The effect of the distribution of royalties among ASCAP and BMI members and affiliates, moreover, is identical to that perceived in *Citizen Publishing*: the copyright proprietors' incentives to compete are "sharply reduc[ed]"[34] and "dull[ed]"[35] by such an arrangement.[36]

Finally, purported justifications for the common selling agency's price-fixing and profit pooling practices based on alleged industry need or perceived social benefits are, under *Citizen Publishing* (and more recently, *Professional Engineers*), no defense to the *per se* violation which inheres in the arrangement.

The effect, then, of ASCAP's and BMI's blanket licensing arrangements with copyright holders has been to eliminate price competition among individual copyright owners over the performance of their musical compositions within the meaning of the *Container*, *Socony-Vacuum* and *Trenton*

34. Brief for Respondent at 22-23, *Citizen Publishing, supra.*

35. *CBS* v. *American Society of Composers, Authors and Publishers, supra,* 562 F.2d at 139.

36. ASCAP notes that "under the weighting rules which ASCAP has adopted . . . all performances do not earn the same credit. For example . . . 'serious' music is encouraged through a performance weighting system that rewards its composers more generously than composers of popular music." Brief for Petitioners ASCAP at 22n. Thus, remuneration under the blanket licenses may be seen, in addition, not to reflect normal market demand for, *e.g.*, more "popular" music than "serious" music but, rather, artificial distribution formulae among more "deserving" copyright owners. Such a displacement of the laws of supply and demand is the hallmark of any cartel. *See Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4 (1958) ("The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ."); *Professional Engineers, supra,* 435 U.S. at 695-96; R. Bork, *The Antitrust Paradox* 44-45 (1977) (hereinafter "Bork").

Potteries line of cases. The teaching of *Citizen Publishing*, moreover, makes clear that a characterization of the pricing restraint as occurring through a common selling agent, rather than through direct price-setting by each of the members and affiliates, or the contention that "business necessity" allegedly compels the arrangement, cannot alter the fundamental illegality of the arrangement.

The fundamentally illegal nature of the ASCAP and BMI blanket licenses, as well as their unlawful purpose, is made all the clearer by an examination of the impact of those licenses on the local television stations. As earlier noted, the predominant portion of the programming for which the local television stations are responsible for obtaining music performance licenses consists of pre-recorded programs. The music contained in such programs is selected not by the local station but by the producer of the programs. The producer engages in negotiations with individual copyright owners for synchronization and motion picture theatre performance licenses to such music. The 22,000 ASCAP members and 49,000 BMI affiliates, in their negotiations with producers, rather than routinely granting television performance rights as well, uniformly withhold such rights, requiring instead that the local television stations obtain the necessary licenses.

The purpose and effect of these arrangements is clear. Since the only forms of license offered by ASCAP and BMI to the local television stations are blanket licenses, these arrangements assure that the local television stations will be required to obtain such licenses. The competition which could otherwise occur between individual copyright holders and producers over television performance licenses

is eliminated in favor of the noncompetitive rewards of the blanket licenses.

This very agglomeration of power through the blanket licenses was condemned by the court in *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S.D.N.Y. 1948), *relief,* 80 F. Supp. 900 (S.D.N.Y. 1948), where the blanket license, perpetuated and forced on movie theatre exhibitors through the splitting of synchronization and motion picture theatre performance rights, was held to violate both Sections 1 and 2 of the Sherman Act. The very same perpetuation of blanket licenses, with the very same purpose and intent, has occurred in the television industry.

For the local television stations, any hopes of avoiding dealing on ASCAP's and BMI's terms are dashed. Since the music for which the stations must obtain licenses is already selected by the producers, the stations cannot hope to obtain anything approximating competitive prices through individual negotiations for the performance rights to such music. As the Government has aptly noted, any such attempts

> "would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows 'in the can.' "[37]

Precisely such a shifting of the time of price negotiation was condemned in *Professional Engineers.* There, the association's ban on competitive bidding unlawfully shifted price negotiations from a point in time before selection of an engineer to after his selection (directly analogous to the

37. Brief for the United States as *Amicus Curiae* at 24.

petitioners' shifting of price negotiations over performance licenses to the time after which the music has been selected). Noting that the association "mistakenly treated negotiation between a single seller and a single buyer as the equivalent of competition between two or more potential sellers," this Court condemned such practice as one which " 'impedes the ordinary give and take of the market place,' and substantially deprives the customer of 'the ability to utilize and compare prices in selecting . . . services [or products]'. . . . On its face this agreement restrains trade within the meaning of §1 of the Sherman Act." 435 U.S. at 692, 693 & n.19.

D. ASCAP's and BMI's Blanket Licenses Have Been Roundly Condemned by This and Other Courts.

The view of the court of appeals as to the legality of the ASCAP and BMI blanket licenses is entirely consistent not only with sound principles relating to price-fixing but also with opinions of this and other courts which have previously examined those licenses.

In 1941, in the context of a challenge to the constitutionality of a state statute making it unlawful for owners of copyrighted music to combine to fix license fees, this Court held that ASCAP's practices fell "squarely" within the law's definition of unlawful restraints of trade. *Watson* v. *Buck,* 313 U.S. 387, 404 (1941). To ASCAP's argument that the statute unconstitutionally deprived copyright owners of rights granted them by the copyright laws, the Court responded:

> "We find nothing in the copyright laws which purports to grant to copyright owners the privilege of combining

in violation of otherwise valid state or federal laws." *Id.* at 404.[38]

In 1948, as previously discussed, ASCAP's licensing arrangements were held to violate Sections 1 and 2 of the Sherman Act in *Alden-Rochelle* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948). The court there found that

> "[a]*lmost every part of the Ascap* [*sic*] *structure, almost all of Ascap's activities in licensing motion picture theatres, involve a violation of the anti-trust laws.* Although each member of Ascap is granted by the copyright law a monopoly in the copyrighted work, it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, even if it is for the purpose of thereby better preserving their property rights." *Id.* at 893. (emphasis added)

On the heels of *Alden-Rochelle*, the court in *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), denied equitable relief to plaintiff-copyright owners who had asserted copyright infringement claims against motion picture exhibitors who had failed to obtain ASCAP licenses to perform plaintiffs' music. Following the rationale of *Alden-Rochelle*, the court held that ASCAP had violated the antitrust laws and misused its copyrights, rendering them unenforceable.

Blanket copyright licenses were again condemned in *Affiliated Music Enterprises, Inc.* v. *SESAC, Inc.*, 160 F.

38. Justice Black who wrote for the majority in *Watson*, had, in an earlier opinion in the same case, characterized ASCAP's blanket licenses as a "flagrant" price-fixing combination, which required purchasers "to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination." *Gibbs* v. *Buck*, 307 U.S. 66, 81-82 (1939) (dissenting from majority's affirmance of preliminary injunction without passing upon the merits).

Supp. 865 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir. 1959), a case which involved claims that another performing rights society had engaged in monopolistic practices in acquiring rights to license public performances from copyright owners. The court described the defendant's blanket license agreements with copyright owners as a "classic pooling of rights and sharing of revenue," citing and relying upon the holdings of *per se* illegality in *Alden-Rochelle* and *M. Witmark*. *Id.* at 875. The court further noted that

> "[t]he advantages derived from collective licenses and the numerous practical difficulties attendant on individual licenses do not absolve collective licenses from the antitrust laws." *Id.*

The ruling of the court below is, therefore, supported both by traditional principles relating to price-fixing arrangements and the application of those principles to ASCAP and BMI by this and other courts.

E. The Purported Applicability of the "Rule of Reason" to the ASCAP and BMI Blanket Licenses

ASCAP and BMI, not surprisingly, and the Government, altogether surprisingly (except, perhaps, in light of its own historically aberrational treatment of this industry) urge that a "rule of reason" test should be applied to the petitioners' blanket licensing practices in order to determine the legality of those practices under the antitrust laws.[39] Upon analysis, the petitioners' and the Government's arguments amount to nothing other than an effort

39. *See* Brief for Petitioners ASCAP; Brief for Petitioners BMI; and Brief for the United States as *Amicus Curiae*.

to create an exception to the *per se* rule against price-fixing, based on the alleged "unique" and "*sui generis*" nature of the music performance licensing industry—an effort which, as a matter of sound policy and adherence to established legal precedent, this Court should not countenance.

1. Petitioners' Rule of Reason Argument

The thrust of petitioners' argument that the *per se* rule is inapplicable to their activities is not so much that these activities, as a matter of fact, do not constitute price-fixing (although this is, of course, asserted); it is, instead, that even if a finding is made that the purpose or effect of the practices is to tamper with (or as BMI would urge, "affect")[40] market prices, the "*sui generis*" nature[41] of the music industry makes appropriate a wide-ranging inquiry into whether, all things considered, the conduct should be condemned. Stated another way, the petitioners contend that the Court should evaluate factors other than the competitive impact of their conduct—in essence, weigh all of the social and economic factors which may have a bearing on the vitality of the market for music performance licenses. Petitioners apparently argue that their blanket license system inevitably arises out of the intrinsic nature of music licensing.[42] In other words, competition among copyright

40. Brief for Petitioners BMI at 20.

41. Brief for Petitioners ASCAP at 27-28.

42. To cite BMI:

"If BMI and ASCAP did not exist, the natural barriers would result in the acquisition of far fewer public performance licenses —with the consequence that users would either perform less music than they would prefer, or perform some music without the licenses necessary to avoid civil and criminal liability. BMI and ASCAP thus exist because they fill a definite and clear market need." Brief for Petitioners BMI at 24.

holders is inimical to music licensing. Even were this astounding assertion true,[43] it would be properly addressed not to the courts but to Congress in support of arguments for legislative immunity from antitrust or appropriate regulation of music licensing. The cases, including those relied on by ASCAP and BMI, simply do not support the kind of expansive *judicial* inquiry envisioned by those organizations.

As earlier discussed, once a court viewing an alleged price-fixing arrangement has determined that the concerted conduct at issue has the purpose or effect of fixing, raising, depressing, pegging or stabilizing market prices (as the blanket licenses unquestionably do),[44] such determination "unequivocally foreclose[s] . . . an inquiry into the reasonableness of the prices. . . ," *Professional Engineers, supra,* 435 U.S. at 689, and the conduct is held to be *per se* unlawful.

As an initial matter, then, it is not the law, as ASCAP and BMI urge, that "any conduct . . . which may improperly affect price" is subject to evaluation under the rule of reason.[45] The cases relied on for this extraordinary proposition either deal with equivocal conduct of uncertain effect on price, where the Court was required to investigate

43. Of course, the assertion is not true. "[There is] nothing in the copyright laws which purports to grant to copyright holders the privilege of combining in violation of otherwise valid state or federal laws." *Watson* v. *Buck, supra,* 313 U.S. at 404. Moreover, even the rule of reason advocated by petitioners "does not support a defense based on the assumption that competition itself is unreasonable." *Professional Engineers, supra,* 435 U.S. at 696.

44. *See discussion, supra,* at pp. 18-27. *See also* Brief for the United States as *Amicus Curiae* at 16-17.

45. Brief for Petitioners BMI at 20.

whether in fact it was dealing with price-fixing (*see, e.g., United States* v. *Citizen and Southern National Bank*, 422 U.S. 86 (1975); *Maple Flooring Manufacturers Ass'n* v. *United States*, 268 U.S. 563 (1925); *Cement Manufacturers Protective Ass'n* v. *United States*, 268 U.S. 588 (1925)); are cases not involving pricing restraints at all (*see, e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) and *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958)); or simply are not supportive of the assertion at all (*see, e.g., National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), where the Court found the agreement to be unlawful "on its face," thus requiring "no elaborate industry analysis"; *United States* v. *Container Corp.*, 393 U.S. 333 (1969) and *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553 (1936), where the Court applied a *per se* rule after determining that the activities constituted price-fixing arrangements).

The further contention that the existence of *sui generis* industry facts warrants the application of a rule of reason standard to price-fixing agreements[46] is equally contrary to the cases. As this Court made clear in *Professional Engineers*, a court's inquiry must be limited to "a judgment about the competitive significance of the restraint," and not a decision as to "whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." 435 U.S. at 692. Accordingly, a court is not at liberty to take a *per se* unlawful agreement out of that category on the ground that "because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *Id.* at 689.

46. Brief for Petitioners ASCAP at 27-28.

No case relied on by ASCAP and BMI supports the view that otherwise *per se* unlawful price-fixing violations may, in the case of unique industry conditions, be scrutinized by the courts to evaluate the efficacy of the competitive model in that industry. No such cases exist. Price-fixing, once identified, is, and has consistently been recognized to be, illegal *per se*.

2. *The Government's Rule of Reason Argument*

The Government's brief properly recognizes that

> "[a]n agreement among competitors to charge a particular price, manufacture a particular quantity, adjust the terms of competition, or otherwise tamper with the price-setting mechanism of the marketplace is unlawful *per se*, no matter how reasonable the price set may be, no matter how ruinous competition otherwise may be, and no matter how legitimate the association otherwise may be."[47]

The Government further notes that, as associations "composed of persons who otherwise are competitors," which offer licenses at prices set by the associations, and which, in so doing, alter "the circumstances under which copyrights are available in the marketplace," the petitioners' arrangements have "important features in common with other arrangements that, this Court has held, are *per se* illegal."[48]

Yet, after acknowledging the clear applicability of *per se* standards to the petitioners' activities, the Government, in violation of its own, and this Court's, previous pronounce-

47. Brief for the United States as *Amicus Curiae* at 14.

48. *Id.* at 16-17.

ments, urges that these practices not be condemned under a *per se* rule since "performing rights societies, and blanket licenses for copyrighted works, do not invariably produce inefficiencies and waste of the sort that should lead to automatic condemnation."[49]

In support of this contention, the Government cites two purported features of the blanket licenses: first, the licenses are said to constitute a separate and "unique" product, "fundamentally different from any license any one of [ASCAP's or BMI's] members [or affiliates] can sell";[50] and second, it is contended that the licenses "achieve substantial efficiencies" beneficial to both users and copyright owners.[51]

There is a sense of *deja vu* in reading the Government's brief and viewing the Government's effort to exempt petitioners from the workings of the *per se* rule. While the Government's rubric for seeking to preserve the petitioners' blanket licenses from condemnation under the antitrust laws has changed slightly from that expressed in its previous submission to this Court in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968),[52] the fundamental (and wholly impermissible) premise of the Government remains unchanged.

49. *Id.* at 17.

50. *Id.*

51. *Id.*

52. The Government's *K-91* brief appears as the Appendix to the Brief for the United States as *Amicus Curiae* herein.

In *K-91*, the Government, after acknowledging that ASCAP's activities were "subject to charges of illegal pooling and price-fixing,"[53] nevertheless urged that account be taken of the "relevant economic setting" in which ASCAP operates.[54] The Government noted:

> "The extraordinary numbers of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create *unique market conditions* for performance rights to recorded music."[55] (emphasis added)

The Government there concluded:

> "If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them."[56]

The Government in the instant case attempts to harmonize its present views with those expressed in *K-91*, by suggesting that the Government's position in *K-91* was merely

53. Brief for the United States as *Amicus Curiae* at 7, on Petition for Certiorari, *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967).

54. *Id.* at 7-8.

55. *Id.* at 10.

56. *Id.* at 10-11.

that "blanket licenses serve a valuable economic function and therefore should be evaluated under a rule of reason."[57] In fact, and despite its disclaimers, what the Government has sought to do in both cases is have this Court create a glaring escape to price-fixing liability on the grounds that the price-fixing arrangement facing the Court does not "invariably" create inefficiencies and waste, is dictated by "unique" industry circumstances, and is required "if this market is to function at all." Yet, the Government's attempt would undermine the very purpose of the *per se* rule, which has been to avoid

> ". . . the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958).

This position, moreover, is directly at odds with all of the Government's, and this Court's, earlier expressions with respect to efforts to justify price-fixing arrangements.

In *Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969), as earlier noted, the Government responded to attempts to justify price-fixing and profit pooling arrangements as follows:

> "Appellants' argument thus amounts to a plea that business necessity can justify *per se* violations of the

57. Brief for the United States as *Amicus Curiae* at 21-22 n.18.

Sherman Act. Guided by considerations of effective antitrust enforcement, this Court (*see United States* v. *Trenton Potteries Co.,* 273 U.S. 392) has repeatedly declined to entertain such pleas in the past. No reason exists why it should apply a different approach here."[58]

• • •

"We do not attempt here to evaluate these conflicting economic and social views, and we do not believe the Court should do so. This Court has repeatedly rejected claims of ruinous competition or even improvement in distribution of a product as justifications for price-fixing, profit pooling, or market allocation agreements . . . . Congress has determined that the free play of economic forces is the best assurance of the allocation of resources to social advantage . . . . "[59]

The Government's view in *Citizen Publishing* is entirely consistent with the Court's recent admonition that courts are not at liberty to take a *per se* unlawful agreement out of that category on the ground that "because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition."[60] Neither, this Court reminded, is it for a court to evaluate "whether a policy favoring competition is in the public interest, or in the interest of members of an industry."[61]

If judgments are to be made that exceptions to the application of the Sherman Act may be in society's best interest (the avoidance of risks to public health and safety in *Professional Engineers,* the preservation of multiple

58. Brief for Respondent at 38, *Citizen Publishing, supra.*

59. *Id.* at 46-47 (citations omitted).

60. *Professional Engineers, supra,* 435 U.S. at 689.

61. *Id.* at 692.

news and editorial sources in *Citizen Publishing*, and, *arguendo*, the availability of as much music as possible in furtherance of the arts in the case of ASCAP and BMI), these judgments must be made by the Congress. *See Professional Engineers; Northern Pacific Railway; Trans-Missouri Freight*. As the Government is well aware, and has itself pointed out,[62] such exemptions have been enacted only where the *congressional* judgment has been that free market forces will produce unacceptable results for society.

Looking more closely at the Government's rationales for ignoring the *per se* rule which (presumably) would be applied in any other industry context, those rationales evaporate.[63] The Government hypothesizes that the blanket licenses offer users a new product (a pool of musical compositions) not available through individual copyright owners. Yet, television stations and other users do not perform a *pool* of compositions; they perform *individual* compositions and no persuasive reason has been advanced why those individual compositions should not be priced in a competitive marketplace. The Government's position is all the more extraordinary when one considers that this new "product" is the result of the elimination of competition, pure and simple.[64] To the extent that certain users

62. *See* Brief for Respondent at 44-45, *Professional Engineers, supra.*

63. It is noteworthy that the Government applies these rationales only to industries (radio and restaurants) not involved in the instant suit and as to which no record has been developed.

64. Even in those circumstances in which a new product was created by the combined resources of competitors, this Court has not permitted that factor to justify the elimination of competition between those competitors. *See, e.g., United States* v. *Topco Assoc.*, 405 U.S. 596, 610-611 (1972).

We also note that this Court has never permitted a pooling of *unrelated* copyrights or patents to be justified on the basis that a new

(footnote continued on next page)

may want immediate access to a large number of works, this fact alone certainly would not constitute justification for a licensing system which requires the fixing of prices in bulk for *all* compositions, regardless of their use or value.

The Government's second argument—that the blanket licenses reduce transaction costs—is again nothing other than an effort to justify the arrangements based on purported "market necessity." Such effort is impermissible. In any event, the proposition is open to serious question, at least with respect to the industry involved in this litigation—television. As discussed, the intent and effect of the blanket licenses as applied to local television stations has been not to *reduce* transaction costs, but to *increase* them dramatically. Mechanisms for the direct licensing of performance rights in pre-recorded programming already exist in connection with the producers' negotiations with individual copyright holders. The blanket licenses have displaced such a mechanism (and the competition which would result therefrom). Thus, the cost savings hypothesized by the Government are purely illusory.[65]

product was thereby created. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 135 (1969); *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962); *United States* v. *Masonite Corp.*, 316 U.S. 265, 276 (1942); *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 459 (1940). The petitioners' blanket licenses do not involve a case resembling a pooling of *blocking* or *overlapping* patents as was considered in *Standard Oil Co.* v. *United States*, 283 U.S. 163 (1931).

65. Clearly, the purported "efficiencies" of the blanket licenses are "subordinate to the price fixing, and not the other way around." Bork, *supra*, at 268.

Conclusion

Precedent, as well as the dictates of sound antitrust enforcement, leads to the conclusion that the holding of the court of appeals should be affirmed, thus mandating the restoration of free competition in the licensing of music performance rights in place of the existing noncompetitive and *per se* unlawful blanket licensing system.

Respectfully submitted,

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December 15, 1978

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 15 1978
MICHAEL RODAK, JR., CLERK

NOS. 77-1583 and 77-1578

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,
V.
COLUMBIA BROADCASTING SYSTEM, INC.
AND
BROADCAST MUSIC, INC., ET AL
V.
COLUMBIA BROADCASTING SYSTEM, INC.

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

BRIEF FOR THE UNIVERSITIES OF THE STATE OF TEXAS AND THE STATE OF TEXAS AS AMICUS CURIAE

* * *

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

* * *

NOS. 77-1583 and 77-1578

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

V.

COLUMBIA BROADCASTING SYSTEM, INC.
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BROADCAST MUSIC, INC., ET AL

V.

COLUMBIA BROADCASTING SYSTEM, INC.

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

BRIEF FOR THE UNIVERSITIES OF THE STATE OF TEXAS AND THE STATE OF TEXAS AS AMICUS CURIAE

* * *

QUESTION PRESENTED

Amicus will discuss the question of whether a per use system of licensing is a feasible and reasonable mechanism to avoid the anti-competitive effect of the blanket license.

INTEREST OF AMICUS

This case presents the question of whether the blanket

licensing scheme engaged in by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) for its non-dramatic performing rights is a violation of Section 1 of the Sherman Antitrust Act.[1] The decision of the Court of Appeals for the Second Circuit, finding such a Section 1 violation, would enable a television network to obtain a per use license[2] from ASCAP or BMI for the first time.

Under the new federal copyright act, effective January 1, 1978, schools, colleges and universities must pay royalties for any non-dramatic performance of a musical work unless: the use is not for profit, no one connected with the performance is paid, there is no direct or indirect admission charge, or if there is an admission charge, the net proceeds must be "used exclusively for educational, religious or charitable purposes and not for private financial gain."[3] As a result ASCAP and BMI offered schools and universities blanket licenses. The cost of the licenses was in no way keyed to the use of music. Rather, the blanket licenses charged six cents per student (ASCAP) and five and one half cents per student (BMI). *See* Appendices A and B, contracts set forth. Under the blanket licensing scheme state colleges and universities will pay for music not

---

[1]Section 1 of the Sherman Antitrust Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, is restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. §1 (1970)

[2]Under the terms of a per use license, an ASCAP or BMI licensee would pay according to its actual use of music. *See CBS, Inc. v. ASCAP*, 562 F.2d 130, 134 n. 9, (2nd Cir. 1977)

[3]17 U.S.C.A. §110(4)(A) and (B) (West Cum. Supp. 1977)

used and some will pay more than others for the same usage.

The expenditure of state funds is involved in cost of these blanket licenses and the Attorney General of Texas is charged with the representation of state educational institutions.[4] The universities and the State of Texas, therefore, have a substantial interest in this case.

STATEMENT

A. THE APPLICATION OF THE 1976 COPYRIGHT ACT TO COLLEGES AND UNIVERSITIES

Under the new copyright act, the word "publicly" has been defined in a manner that alters previous judicial definitions.[5] A performance is public if it takes place at a place open to the public and at any place where a substantial number of persons is gathered. Thus, performances in schools and universities are public performances subject to copyright control.

There are seven exemptions in Section 110 of the 1976 Act that pertain to these public performances of music:

1. Face to face teaching activities
2. Instructional broadcasting
3. Religious services
4. Certain other non-profit performances
5. Mere reception in public
6. Agricultural fairs
7. Retail sale of records and tapes

---

[4]Art. 4399, Vernon's Revised Texas Civil Statutes.

[5]17 U.S.C.A. §101 (West Cum. Sup. 1977).

Section 110(1) requires that for exemption under the face to face teaching provision there be instructors or pupils, face to face teaching activities, a non-profit educational institution and a classroom or similar place devoted to instruction. The House Report covering this Section[6] indicates that the exemption does not cover musicians brought into the classroom from outside, nor is the word instructor broad enough to cover such musician.[7]

Section 110(2) requires a transmission of a non-dramatic musical work, that the performance be in the regular course of systematic instruction at a non-profit educational institution, that the performance be directly related to teaching content and that the transmission be made for specified purposes. Systematic instruction means teaching of materials which are integrally related to the curriculum; it does not include performances, regardless of cultural or intellectual worth, which only entertain.[8]

The exemption pursuant to Section 110(3) requires performance of non-dramatic musical work in the course of services and at a place of worship or religious assembly.

Section 110(4) is a catch-all. This provision exempts direct performances before an audience, live or by record, if there is no direct or indirect commercial advantage and if done without the payment of any fee or other compensation to any of the performers, promoters or organizers. If all of these criteria are met there still cannot be an exemption unless any admission charged is used exclusively for educational, religious or charitable purposes.

---

[6]H. Rep. No. 94-1476, 94th Cong. 2nd Sess. (1976), p. 82.

[7]*Id.* at p. 81.

[8]*Id.*

The fifth, sixth and seventh exemption have no particular unique application to colleges or universities.

B. THE OPERATION OF THE ASCAP AND BMI LICENSES IN THE UNIVERSITIES

The contracts offered by ASCAP and BMI (Appendices A and B) are two part; containing an annual "blanket" fee based on full-time enrollment and an additional fee schedule for performances where the "entertainment costs" are one thousand dollars or more. Under this tiered structure, the "blanket" or "head tax" fee is designed to cover the day to day musical uses of colleges and universities. Primary among these are the campus dances, coffee houses, sporting events where a fee is paid to the musical performers. It is unclear whether half-time shows at football games are exempt performance or not since there is a fee paid to see the football game.

The volume of music on any given university or college campus varies from campus to campus and from year to year. Under the contracts offered, some schools pay more for the right to perform music than others. Both ASCAP and BMI require that fees for major attractions be paid whether or not any of either of BMI's or ASCAP's repertory of music is performed. In addition, a concert of music licensed only to BMI would create a liability to ASCAP despite the fact that no ASCAP music was used.

Beyond these anomolies, the blanket licensing agreement being offered to colleges and universities requires the schools to take on the administrative burden of reporting monthly to ASCAP and BMI.

These reports include:

"total student enrollment for the 1977-1978

school year, by September 1, 1978; for the 1979 school year by December 31, 1978; and for the 1979-1980 school year by December 31, 1979; and for each concert, recital, similar or other event at which music is performed, for which admission is charged and for which the performer or performers are paid a total of $1000 or more, the date, name of attraction(s) appearing, name, address and seating capacity of the location, and highest price of admissions (exclusive of tax), of each such presentation, by the tenth day of each month for all concerts, recitals, similar or other event at which music is performed presented during the previous month."

Appendix A

The reporting duty further includes the furnishing, on a monthly basis, of

> "copies of all programs of musical works performed by licensee in each of its concerts, recitals and similar events presented during the previous month, which are prepared for distribution to the audience or for the use or information of Licensee or any department thereof. Such copies of programs shall include all encores to the extent possible."

Appendix A

SUMMARY OF ARGUMENT

The formula used by the performing rights societies is not based on the use of music by the respective colleges and universities. The expanded coverage of the 1976 Copyright Act opened a whole new area for ASCAP and BMI to issue their blanket licenses. Universities and colleges are not financially nor administratively

equipped to solicit direct licensing, nor are they in a position to go to court to negotiate a "reasonable fee", which is the alternative ASCAP offers if a school rejects the form license. The blanket license offered to the nation's colleges and universities provides a windfall to the performing rights societies given the negligible bargaining power of the schools and, in addition, these licenses in their present form shift virtually all of the administrative burden to the licensee schools.

To complicate matters further the Texas Constitution, Article III, Section 51 prohibits the gift of public funds to private persons. In other words, colleges and universities must receive adequate consideration for the payment of license fees. *See, Dodson v. Marshall*, 118 S.W.2d 621 (Tex.Civ.App.--Waco 1938, writ dismd.); Attorney General Opinions H-520 (1974); H-403 (1974). Certainly a per use system of licensing would more effectively assure that colleges and universities received adequate consideration for the payment of license fees.

The per use remedy suggested by the Second Circuit in *CBC, Inc. v. ASCAP*, 562 F.2d 130, 140 (2nd Cir. 1977) will equalize the administrative burden of copyright licensing and will allow for a reasoned determination about the desirability *vel non* of blanket licenses.

ARGUMENT

WHETHER THE COURT UTILIZES THE PER SE RULE WITH A MARKET FUNCTIONING EXCEPTION OR A RULE OF REASON ANALYSIS, THE SUGGESTED REMEDY OF PER USE LICENSING IS NECESSARY TO ASSURE A COMPETITIVE PRICING STRUCTURE FOR THE USE OF MUSICAL COMPOSITIONS.

In *CBS, Inc. v. ASCAP*, 562 F.2d 130, 136 (2nd Cir. 1977) the Court labeled the blanket license a price-fixing mechanism. While a direct market, if available, provides a defense to a charge of block booking, it is not a defense to a charge of price fixing since the blanket licenses affect the copyright holder's desire to negotiate a separate contract. The availability of direct negotiations with the copyright holder deprives ASCAP of the only defense to a charge of price fixing. *CBS, Inc. supra* at 138. Once the per se rule with a market functioning exception is used, price fixing is illegal unless it is necessary for the market to function al all. *CBS, Inc., supra* at 136. In theory the market could function through an individual licensing scheme so the blanket license is per se illegal.

At the same time the CBS Court was applying the per se rule it observed:

> The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the *impracticability of negotiating individual licenses* for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

CBS, Inc., supra at 137.

It was the recognition of this phenomena which caused the CBS Court to allow the retention of the blanket license. But the Court could not find a market necessity due to the availability of a direct market. Thus the impractibility of direct negotiations contrasted with the availability of the direct market left the CBS Court with the difficult task of fashioning relief which was

reasonable and still consistent with the concerns of anti-trust legislation.

The Court considered the effect of the 1950 consent decree both in pragmatic terms and as a potential defense to price fixing. In *K-91, Inc. v. Gershwin Publishing*, 372 F.2d 1, 4 (9th Cir. 1967) the Court accepted this defense. The CBS Court rejected it because CBS was not a party to the consent decree. Treating the terms of the decree, that is its requirement that dissatisfied parties turn to the Court to set a reasonable price, the CBS Court reasoned that a judicial determination of reasonable price is not as desirable as a competitive price. The economic fact is that the reasonableness of prices have no constancy and would require constant supervision and administration. Yet it is just this alternative which colleges and universities must choose if they do not believe the blanket licenses they have been offered are reasonable.

An alternative analysis and one which could be directed to achieve the same balanced relief which the CBS Court sought is the rule of reason articulated in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). *American Tobacco* defines illegal restraint of trade to include those price fixing "acts or contracts or agreements or combinations which [operate] to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade." *American Tobacco, supra* at 179. In determining whether there is an illegal restraint of trade by price fixing, the public interest in the individual right to contract and in the movement of trade could be considered. The *American Tobacco* analysis allows for an inquiry into the purpose and effect of the blanket license. It allows for flexibility in treating a unique industry. The CBS Court could have found, under this approach, that the blanket license is necessary but that it dulls the incentive of the individual copyright holder

to compete. Thus, a remedy could have been fashioned to assure the availability of a competitive price and still allow maintenance of the blanket license.

In *CBS, Inc.*, the Court suggested that ASCAP be required to provide some form of per use licensing. This would allow for protection from infringement through more freedom of choice and assure competitive prices. With respect to this relief, colleges and universities would be able to reasonably assess their needs and usages, and to negotiate from a position of equality rather than from the adhesion posture they presently hold.

The per use licensing option may well be transitional relief which would ultimately lead to pure direct licensing and truly competitive pricing. But whether it is the means by which market forces break down the performing rights societies cartel or not, the equality of such a system affords licensees is desirable.

CONCLUSION

For the reasons above argued, this Court should affirm the result and judgment of the Court of Appeals.

Respectfully submitted,

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December 1978

P.O. Box 12548, Capitol Station
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

* * *

No. 77-1578

* * *

BROADCAST MUSIC, INC., et al,
Petitioners,

-against-

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

* * *

No. 77-1583

* * *

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,
Petitioners,

-against-

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

* * *

AFFIDAVIT OF SERVICE

* * *

STATE OF TEXAS)(

COUNTY OF TRAVIS)(

ROBERT S. BICKERSTAFF, being duly sworn, deposes and says that he is in the employ of the Attorney General of Texas, counsel for amicus curiae, State of

Texas and Texas Colleges and Universities, not a party to the within action, is over the age of 18 years and resides at P. O. Box 12548, Capitol Station, Austin, Texas 78711.

That on the _____ day of _____, 1978, he served the Brief of Amicus Curiae upon each of the below-listed attorneys by depositing three (3) copies of said Brief securely enclosed in properly addressed postpaid wrappers, directed to said attorneys, in an official depository maintained and exclusively controlled by the United States Postal Service at P. O. Box 12548, Capitol Station, Austin, Texas 78711.

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_____
ROBERT S. BICKERSTAFF

Subscribed and sworn to before me this _____ day of _____, 1978.

_____
NOTARY PUBLIC

APPENDIX A

ASCAP

College and University License Agreement

AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("Society"), located at One Lincoln Plaza, New York, New York 10023 and

located at ("Licensee", as follows:

1. **Grant and Term of License**

(a) SOCIETY grants and LICENSEE accepts for a term commencing January 1, 1978 and ending December 31, 1979 a license to perform publicly on LICENSEE's "premises" (as hereinafter defined) and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term hereof in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights. For purposes of this agreement, LICENSEE's "premises" shall include LICENSEE's campus, any establishment in the United States engaged by LICENSEE exclusively, or any organization such as a fraternity, sorority, social club or similar organization affiliated with LICENSEE which may be located off LICENSEE's campus but is run under LICENSEE's auspices exclusively for the benefit of LICENSEE's students.

(b) This agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder as to performances rendered, acts done and obligations incurred prior to the effective date of the assignment.

(c) SOCIETY and LICENSEE agree that this agreement is being entered into on an experimental and

nonprejudicial basis, shall apply for the term of this agreement only, and shall not be binding upon or prejudicial to any position taken by either of the parties for any period subsequent to the termination of the agreement.

2. **Limitations on License**

(a) This license is not assignable or transferable by operation of law or otherwise, except as provided in Paragraph "1(b)" hereof, and is limited to the LICENSEE and to the premises.

(b) This license does not authorize the broadcasting, telecasting or transmission by wire or otherwise, of renditions of musical compositions in SOCIETY's repertory to persons outside of the premises.

(c) This license does not authorize any performance by means of cable television, cable radio or closed circuit limited radiation carrier current radio or television station; or performance by means of a coin-operated phonorecord player (jukebox) otherwise covered by the compulsory license provisions of 17 U.S.C. §116.

(d) This license is limited to nondramatic performances, and does not authorize any dramatic performances. For purposes of this agreement, a dramatic performance shall include, but not be limited to, the following:

(i) performance of a "dramatico-musical work" (as hereinafter defined) in its entirety;

(ii) performance of one or more musical compositions from a "dramatico-musical work" (as hereinafter defined) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken:

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;

(iv) performance of a concert version of a "dramatico-musical work" (as hereinafter defined).

The term "dramatico-musical work" as used in this agreement, shall include, but not be limited to, a musical comedy, oratorio, opera, play with music, revue, or ballet.

(e) SOCIETY reserves the right at any time to restrict the first American performance of any composition in its repertory and further reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in SOCIETY's repertory, or on a claim that SOCIETY does not have the right to license the performing rights in such composition.

3. **License Fee**

In consideration of the license granted herein, LICENSEE agrees to pay SOCIETY the following license fees:

(a) Six cents per "student" (as hereinafter defined) or $50.00, whichever is greater, annually. For purposes of this agreement, the term "student" shall include all undergraduate and graduate "full-time equivalent students" as such term is used in the Higher Education General Information Survey reported to the United States Department of Health, Education and Welfare. Payment of said license fees for the six-month period

January 1, 1978 through June 30, 1978 shall be made on a pro-rated basis by September 1, 1978; for the twelve-month period July 1, 1978 through June 30, 1979, by December 31, 1978; and for the six-month period July 1, 1979-December 31, 1979, on a pro-rated basis, by December 31, 1979.

(b) For each concert, recital, similar or other event at which music is performed, for which there is a direct or indirect admission charge, and for which the performer or performers are paid a total of $1,000 or more, the applicable license fee in accordance with SOCIETY's "Concert Rate Schedule," a copy of which is annexed hereto and made a part hereof, payable by the tenth day of each month for all concerts, recitals, similar or other events at which music is performed presented during the previous month.

4. **Reports of Enrollment and Concerts**

LICENSEE agrees to report to SOCIETY, on forms supplied free of charge by SOCIETY, the following:

(a) LICENSEE's total student enrollment for the 1977-1978 school year, by September 1, 1978; for the 1978-1979 school year by December 31, 1978; and for the 1979-1980 school year by December 31, 1979; and

(b) For each concert, recital, similar or other event at which music is performed, for which admission is charged and for which the performer or performers are paid a total of $1,000 or more, the date, name of attraction(s) appearing, name, address and seating capacity of the location, and highest price of admission (exclusive of tax), of each such presentation, by the tenth day of each month for all concerts, recitals, similar or other events at which music is performed presented during the previous month.

5. **Lists of Compositions**

LICENSEE agrees to furnish to SOCIETY by the

tenth day of each month during the term hereof copies of all programs of musical works performed by LICENSEE in each of its concerts, recitals and similar events presented during the previous months, which are prepared for distribution to the audience or for the use or information of LICENSEE or any department thereof. Such copies of programs shall include all encores to the extent possible.

6. **Breach or Default**

Upon any breach or default by LICENSEE of any term or condition herein contained, SOCIETY may terminate this license by giving LICENSEE thirty days notice to cure such breach or default, and in the event that such breach or default has not been cured within said thirty days, this license shall terminate on the expiration of such thirty-day period without further notice from SOCIETY. In the event of such termination, SOCIETY shall refund to LICENSEE any unearned license fees paid in advance.

7. **Interference in Society's Operations**

In the event of:

(a) any major interference with the operations of SOCIETY in the state, territory, dependency, possession or political subdivision in which LICENSEE is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

(b) any substantial increase in the cost to the SOCIETY of operating in such state, territory, dependency, possession or political subdivision, by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

SOCIETY shall have the right to terminate this agreement forthwith by written notice.

8. **Notices**

All notices required or permitted hereunder shall be given in writing by certified United States mail sent to either party at the address state above. Each party agrees to inform the other of any change of address.

IN WITNESS WHEREOF, this agreement has been duy executed by SOCIETY and LICENSEE this day of , 19 .

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

BY _____

_____
Licensee

BY _____

_____
Title

(seal)

(seal)

CONCERT RATE SCHEDULE*

Seating Capacity **	Highest Price of Admission Exclusive of Tax				
	Up to $3.00	$3.01 to $6.00	$6.01 to $9.00	$9.01 to $12.00	$12.01 and Over
Up to 750	$ 15	$ 22	$ 31	$ 44	$ 57
751-1500	21	29	41	55	70
1501-2500	29	41	53	70	85
2501-4000	41	53	65	85	100
4001-5500	53	65	80	100	125
5501-7500	65	80	100	125	150
7501-10,000	80	100	125	150	180
10,001-15,000	100	125	150	180	210
15,001-20,000	125	150	180	210	240
20,001-25,000	150	180	210	240	270
25,001-40,000	180	210	240	270	300
Over 40,001	210	240	270	300	330

DISCOUNT:

1. Twenty-Five or more Concerts: A discount of 20% may be deducted from the above fees for payment for each concert in excess of twenty-five performed by LICENSEE during a school year.

2. Advance Payment for One Hundred or more Concerts: A discount of 5% may be deducted from the above fees for payment in advance by LICENSEE to SOCIETY for one hundred or more separate concerts.

* This schedule applies to concerts, recitals, similar and other events at which music is performed, for which there is a direct or indirect admission charge, and for which the performers are paid a total of $1,000 or more.

** Where a concert occurs at a location whose total seating capacity has been altered to accommodate a particular performance, the term "seating capacity" shall mean the total number of seats made available for that particular performance.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

CONCERT REPORT MONTH of _____ 19 ____

DATE	NAME OF ATTRACTIONS APPEARING	LOCATION OF PREMISES (name, address)	SEATING CAPACITY	HIGHEST PRICE OF ADMISSION (exclusive of tax)	ASCAP LICENSE FEE

I hereby certify that the foregoing Statement is true and correct as of this _____ day of _____ 19 ____

_____ LICENSEE

By _____

TOTAL

A-8

APPENDIX B

BMI

C/U—78

AGREEMENT made at New York, N. Y. on ..... 19..., between BROADCAST MUSIC, INC. (or BMI), a New York corporation, with its principal offices at 40 W. 57th Street, New York, N. Y. 10019, and

.....
(Legal Name of LICENSEE *and Name of Institution)*

(LICENSEE), with its principal business office located at ..... City of ..... State of ....., Zip No. .....

IT IS AGREED AS FOLLOWS:

1. Definitions

(a) "Term" shall mean the period commencing January 1, 1978 and ending on December 31, 1979. "First Contract Year" shall mean the period commencing January 1, 1978 and ending December 31, 1978. "Second Contract Year" shall mean the period commencing January 1, 1979 and ending December 31, 1979.

(b) "Theaters" shall include, but not be limited to, concert halls, theaters, auditoriums, amphitheaters, stadiums and similar places of performance whether enclosed or not.

(c) "Musical Attractions" shall mean concerts, stage shows, variety shows, symphonies, recitals, chamber music and other similar performances under the sponsorship, control, authority, and with direct or indirect approval of the LICENSEE, where music is performed.

(d) "Seating Capacity" shall mean the total number of seats permanently affixed in any theater where a musical attraction is performed, plus any

temporary seats added within the theater for a particular performance. Should a musical attraction be performed at a theater where the seating capacity has been altered to accommodate a particular musical attraction, or if the total number of seats made available for a particular musical attraction shall be less than that of the seating capacity of said theater, then in those instances, seating capacity shall mean the total number of seats made available for that particular performance. If a site does not have permanent seating, "seating capacity" shall be interpreted to mean the number of persons attending a particular performance.

(e) "Full-time Students" shall include all full-time students and full-time equivalents attending an institution for educational purposes and shall include, but not be limited to, graduate and undergraduate students. Part-time students shall be converted into full-time equivalents pursuant to the methods set forth in the Higher Education General Information Survey as conducted annually by the Department of Health, Education, and Welfare and shall include, but not be limited to, graduate and undergraduate students.

(f) "Entertainment Costs" shall mean the total monies expended by LICENSEE (or the persons having direct or indirect authority from LICENSEE to promote musical attractions) for a musical attraction and shall include, but not be limited to, main attractions, supporting acts, monies paid to performers, monies paid to booking agents, monies paid to agents of the performer, monies paid to supporting musicians, room, board and transportation.

(g) "Public Domain Music" shall mean any musical composition not protected by copyright.

2. In the event LICENSEE has a pecuniary interest in an establishment or property for investment purposes

which is not directly related to LICENSEE'S educational purposes at which establishment or property musical compositions are being performed publicly, it is specifically understood and agreed to by LICENSEE that this license shall not apply to such other establishment or property.

3. BMI hereby grants to LICENSEE for the term of this agreement a non-exclusive license to perform or cause the performance of musical compositions to which BMI shall have the right to grant public performance licenses for performances presented under the sponsorship, control, authority, and with the direct or indirect approval of LICENSEE. This license is not assignable and no rights other than those mentioned are included in this license. This license does not include:

(a) Dramatic rights or the right to perform dramatico-musical works in whole or in substantial part; or

(b) The right to broadcast, telecast, or otherwise transmit the licensed musical attraction except within other campus buildings owned or controlled by LICENSEE.

4. LICENSEE agrees to pay BMI a fee for each performance of a musical attraction computed on the basis of Schedule "A" included in and made a part of this contract. Payment for musical attractions shall be made to BMI by the tenth (10th) day of each calendar month of the term hereof for all performances given during the previous month. LICENSEE shall furnish BMI (on forms to be supplied by BMI), at such times as it makes payment of license fees pursuant to this paragraph with a statement signed by an officer, auditor, or authorized official of LICENSEE covering performances of musical attractions occurring during the previous month. Such statement shall include the name of each musical attraction, the dates of each musical attraction

the dates of each musical attraction and the number of performances each day, the theater at which the performance took place and the seating capacity of the theater. A statement shall be furnished to BMI by LICENSEE each month regardless of whether or not any performances occured during the previous month.

5. "Per Student Fee".

(a) Except for those uses previously excluded, LICENSEE shall also pay BMI for each contract year a "Per Student Fee" for all other uses of music, including, but not limited to, campus radio broadcasting stations where said station's gross income derived from the sale of air time is less than $10,000 annually, the sum of five and one-half (5.5) cents per full-time student; or $60.00, whichever is greater. This fee shall be based upon the number of full-time students as defined in paragraph 1(e) for the fall term of each preceding year.

(b) The "Per Student Fee" for the First Contract Year of this contract is $ based upon full-time students enrolled in the institution during the fall term of 1977. LICENSEE shall notify BMI, on a form to be supplied by BMI, no later than November 30, 1978, of the number of Full-time Students, as defined above, attending the institution during the fall term of 1978, which will establish the "Per Student Fee" for the Second Contract Year.

(c) The "Per Student Fee" for the First Contract Year (1978) shall be paid by LICENSEE to BMI in the following manner:

1. One-half of the annul "Per Student Fee" will be due and payable on or before June 10, 1978.

2. The balance of the "Per Student Fee" for the First Contract Year (1978) will be due and payable on or before October 10, 1978.

(d) The "Per Student Fee" for the Second Contract Year (1979) will be paid by LICENSEE to BMI in the following manner:

1. One-half of the annual "Per Student Fee" will be due and payable on or before January 10, 1979.

2. The balance of the "Per Student Fee" for the Second Contract Year (1979) will be due and payable on or before July 10, 1979.

(e) Where LICENSEE does not cause the performance of any music other than musical attractions no "Per Student Fee" shall be due and payable to BMI. In such instances, LICENSEE will pay BMI the fees for musical attractions pursuant to Schedule "A". However, it is agreed and understood by LICENSEE that these fees will be due BMI whether or not the costs of such a musical attraction are less that $1,000.00.

(f) Where LICENSEE, at the time of the execution of this agreement, does not cause the performance of any music other than musical attractions, and thereafter, during the term of this agreement, does cause the performance of any music other than musical attractions, LICENSEE shall notify BMI promptly in writing, and shall pay the applicable "Per Student Fee" from the commencement date of said usuage of music.

6. All campus radio broadcasting stations licensed pursuant to this agreement shall, upon written request from BMI made on not less than one (1) week's notice specifying the period to be covered by the request agree to furnish to BMI weekly lists of station's performances of all musical works, indicating the compositions performed by title and composer or by such other convenient method as may be designated by BMI but such lists need not be furnished for more than two (2)

weeks of each year of the term of this agreement.

7. BMI shall have the right by its authorized representatives, any time during customary business hours, to examine the books and records of account of LICENSEE to such extent as may be necessary to verify any and all statements rendered and accountings made hereunder.

8. In the event that BMI, at any time during the contract term, shall, for the same class and category as that of the LICENSEE issue licenses granting rights similar to those in this agreement on a more favorable basis, BMI shall, for the balance of the term, offer the LICENSEE a contract containing the same terms.

9. BMI agrees to indemnify, save harmless, and defend LICENSEE, its officers, and employees from and against any and all claims, demands or suits that may be made or brought against them or any of them with respect to the performance of any material licensed under this agreement. Such indemnity shall be limited to works which are licensed by BMI at the time of LICENSEE's performance. BMI's Clearance Department will, upon request, advise LICENSEE whether particular musical works are available for performance as part of BMI's repertory. LICENSEE agrees to give BMI immediate notice of any such claim, demand, or suit, to deliver to BMI any papers pertaining thereto, and to cooperate with BMI with respect thereto, and BMI shall have full charge of the defense of any such claim, demand, or suit.

10. All disputes of any kind, nature or description arising in connection with the terms and conditions of this agreement shall be submitted to arbitration in the City, County, and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties shall, by written notice to

the other, have the right to appoint one arbitrator, If, within ten (10) days following the giving of such notice by one party shall not, by written notice, appoint another arbitrator, the first arbitrator shall be the sole arbitrator. If two arbitrators are so appointed, they shall appoint a third arbitrator. If ten (10) days elapse after the appointment of the second arbitrator and the two arbitrators are unable to agree upon the third arbitrator then either party may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties and judgment may be, but need not be, entered in any court having jurisdiction. Such award shall include the fixing of the costs, expenses, and attorney's fees of arbitration, which shall be borne by the unsuccessful party.

11. Upon any breach or default of the terms and conditions of this agreement, BMI may, at its sole option, cancel this agreement with not less than ten (10) days notice in writing to LICENSEE. The right to cancel shall be in addition to any and all other remedies which BMI may have. No waiver by BMI of full performance of this agreement by LICENSEE in any one or more instances shall be deemed a waiver of the right to require full and complete performance of this agreement thereafter or of the right to cancel this agreement in accordance with the terms of this paragraph.

12. All notices given by BMI hereunder shall be duly and properly given if mailed to the address set forth above.

13. This agreement constitutes the entire understanding between the parties with respect to the subject matter hereof. This agreement cannot be waived or added to or modified orally and no waiver, addition or modification shall be valid unless in writing and signed

by the parties. This agreement, its validity, construction and effect, shall be governed by the laws of the State of New York.

BROADCAST MUSIC, INC. .....
LICENSEE*(Legal Name)*

By: ..... By: .....
(Signature)

.....
(Print Name of Signer)

.....
Title of Signer

SCHEDULE A

If the entertainment costs of a musical attraction total $1,000.00 or more, except as provided for in paragraph 5(e), LICENSEE shall pay to BMI the following fee:

Schedule of Rates

CATEGORY	SEATING CAPACITY	FEE PER PERFORMANCE
1	Up to 1,500 seats	$ 15.00 minimum
2	1,501 to 2,500 seats	25.00
3	2,501 to 5,000 seats	40.00
4	5,001 to 7,500 seats	55.00
5	7,501 to 8,500 seats	70.00
6	8,501 to 10,000 seats	85.00
7	10,001 to 12,500 seats	100.00
8	12,501 to 15,000 seats	140.00
9	15,001 to 17,500 seats	160.00
10	17,501 to 20,000 seats	180.00
11	20,001 to 30,000 seats	200.00
12	Over 30,000 seats	300.00 maximum

Where a musical attraction is believed to be comprised entirely of musical compositions which are in the public domain, LICENSEE may, at his option, submit a schedule of all those musical compositions performed at said musical attraction, and in those instances, after review by BMI, where all of the musical compositions performed at said musical attraction are in the public domain, no fee shall be due and payable to BMI. In the event no schedule is submitted to BMI, LICENSEE must pay the applicable fee for said musical attraction pursuant to Schedule "A".

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MOTION FILED
OCT 16 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1578 and 77-1583

BROADCAST MUSIC, INC., et al.,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE*, AND BRIEF OF AMERICAN BROADCASTING COMPANIES, INC., AS *AMICUS CURIAE*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION BY AMERICAN BROADCASTING COMPANIES, INC. FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

American Broadcasting Companies, Inc. ("ABC") hereby petitions this Court for leave to file the annexed brief *amicus curiae*. ABC owns and operates a nationwide television network. In the course of its business, ABC obtains, for programs offered by the ABC television network, blanket licenses from ASCAP and BMI for the nondramatic performance rights to music in their repertories.

In 1977, ABC paid ASCAP and BMI approximately $5,800,000 for blanket licenses to use their respective pools of musical compositions. ABC is directly interested and will be affected by any decision this Court may render concerning the lawfulness, under the antitrust laws, of the licensing practices of ASCAP and BMI with respect to television networks. Counsel for BMI and ASCAP have orally consented to the filing of an amicus curiae brief by ABC. Accordingly, ABC requests permission to file the annexed brief *amicus curiae*.

Dated: New York, New York
December 15, 1978

Respectfully submitted,

CLARENCE FRIED
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HAWKINS, DELAFIELD & WOOD
New York, New York

IN THE

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OCTOBER TERM, 1978
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COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN BROADCASTING COMPANIES, INC., *AMICUS CURIAE*

American Broadcasting Companies, Inc. ("ABC") submits this brief as *amicus curiae*, in order to advise the Court of ABC's interest in the decision by the Court of Appeals below and to urge affirmance of that decision with respect to the claim that ASCAP and BMI are engaged in price-fixing in violation of section 1 of the Sherman Act. Counsel for BMI and ASCAP have orally consented to the filing of an *amicus curiae* brief by ABC.

Interest of the *Amicus Curiae*

ABC owns and operates a nationwide television network. It obtains television performance rights to music used in programs produced or licensed by ABC for broadcast over stations owned by or affiliated with ABC, by obtaining blanket licenses from ASCAP and BMI. The blanket license from ASCAP and the blanket license from BMI cover every musical composition in the ASCAP and BMI repertories regardless of how little or how much music is played during the year. The license fees paid by ABC to ASCAP and BMI are based only on a percentage of income and have no relationship to actual performance of music. The situation with reference to the CBS blanket licenses obtained from ASCAP and BMI is substantially the same as that of ABC. In 1977, ABC paid ASCAP and BMI blanket license fees amounting to approximately $5,800,000.

Accordingly, ABC has a direct and substantial interest in any decision by this Court regarding the licensing practices of ASCAP and BMI, and, in particular, in any decision that will result in and foster competition—which presently does not exist—in the licensing of non-dramatic performance rights for music on network television. Although ABC has not filed its own antitrust action against ASCAP and BMI, ABC will certainly be affected by this Court's decision in this action.

Argument

Musical compositions offered for use in programs broadcast by television networks should be competitively priced. The pooling by ASCAP and BMI of virtually all musical compositions and the pooling of the proceeds derived from

the licensing of such compositions constitute a violation of the antitrust laws. It was so decided in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F.Supp. 888, 893, and 80 F.Supp. 900, 904 (S.D.N.Y. 1948). The Court of Appeals correctly held here that the ASCAP and BMI blanket licenses constitute price fixing in violation of Section 1 of the Sherman Act and observed that "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete." (562 F.2d 130, 140)

Initially, it should be noted that there is no reason why individual composers and publishers cannot compete on a price basis to have their music licensed and used by program producers and networks in television programs. Indeed, the way in which theatrical performance rights for music in movies are licensed to movie producers provides the model for the way in which a competitive market in television performance rights should work. As a result of *Alden-Rochelle, supra, Witmark**, and the 1950 ASCAP consent decree**, the producer of a movie negotiates directly with individual publishers and composers for the right to record the music in question along with the movie, *and* for the right to have the music "performed" (exhibited) as part of the movie in theatres; then, as part of the license agreement between the producer and each theatre owner concerning exhibition of the movie, the theatre owner obtains all the rights necessary to exhibit the movie, including music performances. On the other hand, in the television field, producers license synchronization rights in direct negotiations with individual composers and publishers; but television performance rights in the music

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* *M. Witmark & Sons* v. *Jensen*, 80 F.Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

** *United States* v. *ASCAP*, 1950-51 Trade Cas. ¶62,594.

pools controlled by ASCAP and BMI are obtained on a blanket basis, rather than from the producers of the programs.

Thus, the license fees paid by ABC to ASCAP and BMI are fixed through the ASCAP and BMI instrumentalities for the combination of otherwise competing music composers and copyright proprietors and not by "the unrestrained interaction of competitive forces" (*Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958)) among the copyrights in the pool (and other copyrights, as well). See, *e.g., Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); and *Plymouth Dealers' Ass'n of Northern California* v. *United States,* 279 F.2d 128 (9th Cir. 1960).*

The theoretical "retained right" under the ASCAP consent decree permitting ASCAP members to deal outside the combinations is irrelevant and, in any event, does not change the fact that ASCAP is unlawfully fixing a price for the pooled products. *United States* v. *Socony-Vacuum Oil Co., supra; Plymouth Dealers' Ass'n* v. *United States, supra.* First of all, the "retained right" has never been exercised. Moreover, because ASCAP insists on issuing blanket licenses at fees that have no relationship to a television network's actual use of ASCAP music during the term of the licenses, the alleged "retained right" is meaningless and of no practical benefit to the individual member. Furthermore, the "retained right" of ASCAP members to deal directly does not dilute the effect of

* The suggestion that ASCAP's and BMI's price-fixing is excused because a blanket license is a special "product" is without merit. That argument was correctly rejected by the Court of Appeals. Anything that ABC obtains through a blanket license could be obtained at least as efficiently and cheaply in a competitive, direct-licensing market, such as the one which exists for movie performance rights for music, under *Alden-Rochelle, supra.*

ASCAP's price-fixing power, given the risks of loss and the competitive disadvantage to ABC (or CBS or NBC) if it unilaterally tried to bypass ASCAP. Such risks of loss and disadvantage arise from a number of factors, including (1) the fact that the blanket license dulls ASCAP members' incentive to compete (*see* Pet. App. 20a, 22a) and therefore makes the prospect of success in direct-licensing less likely, if not entirely remote (or more costly), and (2) the problem of acquiring licenses for music that is already "in-the-can" (*see* Brief for the United States at 24-25 & n. 23).

It must also be emphasized that there can be no reason, other than a desire to continue to eliminate price competition, for ASCAP and BMI to refuse to license on a per-use basis, which is clearly less restrictive than a blanket licensing arrangement, and which is directly related to musical performance. Surely, it is feasible for ASCAP and BMI to license on a per-use basis, in view of the fact that performances are logged and royalties are paid to members on that very basis.

Finally, with respect to the Solicitor General's Brief, it should be noted that the Court of Appeals (in considering whether the blanket system was necessary, and in concluding it was not) already performed, in all respects pertinent, the rule of reason analysis which that Brief now urges should be undertaken. Moreover, the application of a per se rule where blanket licensing is not necessary, was urged by the Department of Justice in 1971 in an ASCAP consent decree proceeding instituted by NBC. The Department stated, in part:

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical

necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ACSAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)." Department's Brief in *United States* v. *ASCAP (Application of National Broadcasting Company)*, attached as an appendix to NBC's amicus brief at 15a.

The Department's apparent reversal of position in this Court is unexplained, illogical and wrong. The "collective arrangement with the effect of maintaining prices" has not changed and, if anything, is reemphasized by the failure and refusal of ASCAP to issue per-use licenses on the basis of music actually performed.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Dated: New York, New York
December 15, 1978

Respectfully submitted,

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IN THE

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No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

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COLUMBIA BROADCASTING SYSTEM, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE*, AND BRIEF OF NATIONAL BROADCASTING COMPANY, INC., AS *AMICUS CURIAE*

DAVID R. HYDE
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December 15, 1978

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COLUMBIA BROADCASTING SYSTEM, INC.

MOTION FOR LEAVE TO FILE A BRIEF, AS *AMICUS CURIAE*

National Broadcasting Company, Inc. ("NBC") respectfully petitions for leave to file the annexed brief, *amicus curiae*. NBC owns and operates a nationwide television network which is licensed by ASCAP and BMI and is presently paying the two societies combined some $7,000,000 per annum for the right to perform musical compositions in their respective repertories. As such, it has a direct interest in any decision this Court may render concerning the application of the antitrust laws to ASCAP and BMI and in particular to the construction of the consent decrees in *United States* v. *ASCAP* and *United States*

v. *BMI*. Consequently, NBC requests permission to file the annexed brief, *amicus curiae*.

Dated: New York, New York
December 15, 1978

Respectfully submitted,

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COLUMBIA BROADCASTING SYSTEM, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF NATIONAL BROADCASTING COMPANY, INC., *AMICUS CURIAE*

National Broadcasting Company, Inc. ("NBC") respectfully submits this brief, *amicus curiae*, in order to advise the Court as to its interest in and position with respect to the opinion and order below.

Interest of the *Amicus Curiae*

The NBC Television Network is one of the nationwide television networks licensed by ASCAP and BMI and is

presently paying the two licensing societies combined some $7,000,000 per annum for blanket licenses to perform musical compositions in their respective repertories. As such, it has a direct interest in any decision this Court may render concerning the application of the antitrust laws to ASCAP and BMI and in particular to the construction of the consent decrees in *United States* v. *ASCAP* and *United States* v. *BMI*.

More particularly, the position taken here by the United States, as *amicus curiae*, is in sharp conflict with the position it took in 1971, as plaintiff in *United States* v. *ASCAP*, in a proceeding initiated by NBC under the decree and then pending before the United States Court of Appeals for the Second Circuit. While the present *amicus* brief of the United States construes the ASCAP consent decree to require ASCAP to issue only blanket licenses and rejects the concept of *per se* illegality in connection with ASCAP's activities, the 1971 brief of the United States took the position that ASCAP was required under the decree to issue a non-blanket license limited to specified musical compositions and that its refusal to cooperate with NBC's efforts to procure such a limited license "is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation" (1971 Brief of the United States, p. 15).*

Argument

NBC, like its competitor CBS, has had its differences with ASCAP and BMI over the years. Although NBC has not sought the kind of relief sought by CBS in the pending action, it too has been concerned about the "take it or leave

* A copy of the 1971 brief of the United States, as plaintiff, in *United States* v. *ASCAP*, is reproduced as an appendix to this brief.

it" attitude with which ASCAP and BMI have attempted to impose their blanket licensing structures.

Here, the position espoused by the licensing societies, and now by the United States, essentially presents the television broadcaster with two alternatives—to take blanket licenses from ASCAP and BMI or to obtain all of its music needs entirely through direct licensing, *i.e.*, by "bypassing" ASCAP and BMI. It excludes, as a practical matter, the possibility of a broadcaster obtaining its music requirements in part through the music societies and the remainder through direct licensing—a possibility opened up by the decision of the Court of Appeals which foresees a system of music licensing which will provide alternatives to the music user who wishes to avail himself of them.

A blanket license necessarily lessens competition among music suppliers. In the context of present day television network broadcasting, this lack of competition for music rights presents a unique anomaly. In every other element of programming, price is determined by competitive forces —by one network bidding against the others for programs and by the various program suppliers competing with one another in offering their programs to the networks. Only when it comes to the right to publicly perform copyrighted music is a program element carved out and put beyond competitive forces.

While such a result may be a practical necessity with respect to certain music users, it does not follow that all music must be excluded from the competitive arena in the realm of present day network television. The major portion of the music used on network television today is controlled by a mere handful of parent companies (by and large the established motion picture producers) which have both an ASCAP and BMI publishing subsidiary. These

"publishers" perform few, if any, of the traditional functions of a music publisher and exist mainly as a vehicle to qualify for the receipt of ASCAP or BMI royalties. In terms of gross revenues, it is the parents of those "publishers" which are the principal beneficiaries of the historic ASCAP-BMI blanket licensing system.

When one of the entertainment companies, generally known as "packagers" in the broadcasting business, creates a television program for sale to a network,* it normally employs writers to compose the thematic and background music, which in most instances constitutes the only music used on the program. The packager has "shop rights" to the copyrights used in the same way as a manufacturer obtains "shop rights" to patents resulting from any invention made by his employees during the course of their employment. Thus, a packager could easily sell a complete package directly to the purchaser, not a package which cannot be shown on the air absent a blanket license from ASCAP and/or BMI. The packager's retention of music performance rights, its assignment of these to a "publisher" subsidiary, and its participation in the receipts of the copyright pools serves no economic need. The various considerations advanced to justify indirect, non-competitive licensing through music societies, such as the need for a common agency to police the use of copyrighted compositions and the difficulties in locating a widely dispersed body of composers, are totally absent in this kind of situation. The only thing accomplished is the elimination of competitive pricing for this one program element. Since virtually all of NBC's entertainment programs are acquired

* Virtually all of the entertainment programs shown on the NBC Television Network are produced and owned by independent outside packagers. This season, for example, NBC only produces one regularly-scheduled entertainment program — the one-hour weekly series, "Little House on the Prairie".

from outside purchasers, the anti-competitive impact of ASCAP's and BMI's practices is even more pronounced.

Early in 1970, NBC attempted to procure from ASCAP, under the consent decree in *United States* v. *ASCAP*, a so-called nucleus license rather than a blanket license on the millions of compositions in the ASCAP repertory.* Thus, NBC requested a license limited to some 2,200 compositions and certain background music libraries contained in the ASCAP repertory which its studies showed were used with frequency on the NBC Television Network, or which were contained in programs NBC had "in the can". A comparable request was made of BMI. Such licenses would have permitted NBC to initiate direct licensing with packagers and other large-scale suppliers of music, thus satisfying a major portion of its music requirements through direct negotiations with the copyright owner.

ASCAP vigorously opposed NBC's request, contending that NBC was required to take a blanket license or nothing. A similar position was taken by BMI. NBC then applied to the District Court under the consent decree asking that ASCAP be directed to offer the limited license requested. However, the District Court held in favor of ASCAP, holding that the decree did not require ASCAP to grant a license on anything less than its entire repertory.

NBC then appealed to the Court of Appeals, relying upon the language of the decree itself and the "package licensing" cases; *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948) and *United States* v. *Loew's, Inc.*, 371

* For present purposes, it is immaterial that NBC and CBS may have reached different judgments concerning the most practical and convenient way to deal with the music licensing societies. The real point is that each of the networks should have, and is required to have, the flexibility and fair opportunity to deal for music performance rights in a competitive and proper manner.

U.S. 38 (1962). The United States, in its capacity as plaintiff in the action, filed a brief which, although disagreeing that a package licensing problem was presented, urged reversal of the District Court's decision, noting that:

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)." (Appendix, pp. 13-15).

At this point, before its answering brief was due, ASCAP initiated settlement discussions with NBC which resulted in NBC's taking a blanket license from ASCAP in return for specified amounts. Subsequently, NBC also entered into a blanket license with BMI. In stipulating to dismissal of its appeal as moot, which was "so ordered" by the Court of Appeals on December 21, 1971, ASCAP expressly waived any *res judicata* or collateral estoppel effect with respect to the District Court's order, and it was provided that the dismissal of the appeal was "without prejudice to any

position that any party may take in any future proceeding" under the consent decree.*

Thus, despite its acceptance of blanket licenses in the past, NBC adheres to its legal position that ASCAP and BMI are guilty of *per se* violations of the antitrust laws when they insist users take blanket licenses—or nothing—in situations where a blanket license is not a practical necessity.

The decision of the Court of Appeals—although it does not reach the issue posed by NBC's appeal under the consent decree, *i.e.*, the question of what kind of licenses the decree requires—does, however, concur with the view expressed by the United States in its 1971 brief, *i.e.*, that there is a *per se* antitrust violation when a blanket licensing structure is not based upon practical necessity. The decision below opens up the possibility of a dual licensing structure in which a network could obtain part of its required music licenses from the societies on a per use basis while obtaining the remainder directly from the copyright holder, including program packagers who supply and control the music contained in the programs they sell. Such a result would foster competition in an area where it is presently totally absent. Reversing the opinion below, on the other hand, would in effect give both ASCAP and BMI the unfettered power to continue to extract unnecessary and anticompetitive demands from the networks on a "take it or leave it" basis.

The amicus brief of the United States submitted in this proceeding appears to adopt a position—contrary to that expressed in its 1971 brief—that the ASCAP consent decree contemplates and requires only the issuance of blanket

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* NBC's licenses with ASCAP and BMI expired on September 30, 1976. Since that date, NBC has operated under interim licensing arrangements subject to retroactive adjustment.

licenses (Amicus Brief of the United States, pp. 3-5) and that the refusal of ASCAP and BMI to issue licenses other than blanket licenses is not a *per se* violation of the antitrust laws. In so contending, the *amicus* brief refuses to recognize the differences—which the United States alluded to in its 1971 brief (see quotation, *supra* pp. 9-10)—between a network television broadcaster and other music users, such as the local radio station in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), which stipulated that, as a practical matter, it could not deal directly with copyright holders. Instead, the United States takes the position here that the antitrust principles are based upon some form of symmetry which requires the courts to blind themselves to the "special circumstances" of television broadcasting (Amicus Brief of the United States, pp. 17-18, fn 17).

NBC respectfully submits that the determination of the Court of Appeals herein reversing the District Court represents the proper analysis of the antitrust laws as applied to music licensing and reaches a result, in its remand to the District Court, which paves the way for competition in the one aspect of television programming where it is now absent.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Dated: New York, New York
December 15, 1978

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 71-1487

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS,

Defendant-Appellee,

NATIONAL BROADCASTING COMPANY, INC.,

Applicant-Appellant.

Brief of Plaintiff, United States of America

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In the

United States Court of Appeals

For the Second Circuit

No. 71-1487

United States of America,

Plaintiff,

v.

American Society of Composers, Authors & Publishers,

Defendant-Appellee,

National Broadcasting Company, Inc.,

Applicant-Appellant.

Brief of Plaintiff, United States of America

This is an appeal by the National Broadcasting Company, Inc. (NBC) from an order and judgment of the District Court for the Southern District of New York (J.A. 437-438a) entered January 25, 1971, denying its application for the determination of a reasonable fee for its requested license for performing rights limited to approximately 2,200 compositions in the repertory of the American Society of Composers, Authors and Publishers (ASCAP).

Question Presented

Whether, under the 1950 Amended Consent Decree in *United States* v. *ASCAP*, Civ. Action 13-95 (S.D.N.Y.),[1]

[1] The relevant portions of the decree are set out in the Appendix, *infra*, pp. 19a-27a.

ASCAP may refuse to license less than its entire repertory of non-dramatic non-exclusive performing rights for copyrighted compositions, where the effect is to deter a bulk music user from dealing directly with individual ASCAP members, thus necessarily preventing any price competition between those members.

Statement

This controversy began in the course of negotiations between ASCAP and NBC for a new five-year license for non-dramatic performing rights to copyrighted musical compositions in ASCAP's repertory. On October 14, 1969, NBC asked ASCAP to quote fees "on a blanket basis and on a per program basis"[2] (J.A. 242a). ASCAP did not immediately make any quotation, insisting that it first needed detailed information about NBC's operation (J.A. 238a). By letter dated March 10, 1970, NBC informed ASCAP that it did not believe that ASCAP was either in need of, or entitled to, the requested information (J.A. 112a). At the same time it made application for "a license for approximately 2,217 compositions and certain background music libraries" (*ibid.*). ASCAP's response, on March 17, 1970, suggested that NBC obtain licenses for the compositions it wanted directly from its members in interest and quoted a fee solely on a blanket basis (J.A. 254a). Ten days later NBC made application to the district court

[2] Both blanket and per program licenses give a licensee the right to use ASCAP's entire repertory. A blanket license simply covers the user's entire operations for the duration of the license and the fee is based upon a percentage of his revenues. A per program license covers only those programs in which ASCAP music is actually used. Its fee is based upon a percentage of revenues obtained from those programs only, but that percentage is higher than that charged under a blanket license.

for an interim fee for its designated selections, expressly withdrawing its October 14, 1969 application. On May 13, 1970, NBC formally petitioned the court to set a fee for the desired compositions under Section IX(A) of the 1950 Amended Consent Decree (J.A. 107a-110a).

Before the district court, NBC argued that ASCAP's insistence upon a blanket license is illegal "package licensing." *Reply Memorandum of National Broadcasting Company, Inc.*, May 1, 1970, pp. 2-5. It also argued that the practice unlawfully fixes the prices paid for ASCAP compositions. *Reply Memorandum on Behalf of National Broadcasting Company, Inc.*, July 10, 1970, p. 13. Moreover, it contended that Section VI obligates ASCAP to ascertain the number of compositions it can license as requested, and Section IX(A) requires the district court to determine a reasonable fee for such a license.

ASCAP maintained that the amended decree does not either expressly or impliedly require it to license less than its entire repertory. *ASCAP's Memorandum in Opposition to NBC's Application*, April 15, 1970, pp. 2-3. Sections V(A) and VII, it argued, alone determine what kind of license must be given to telecasters and those provisions require only blanket and per program licenses. *Id.* at 2.

The United States, supporting NBC's application, asserted that Section VI of the decree requires ASCAP, at NBC's request, to seek licensing authority for specified compositions.

The district court denied NBC's application. It held that Section V(A) defines the scope of a license for a television network as "the ASCAP repertory" and no less (J.A. 433a-434a). It construed Section VI as permissive, not mandatory, and not intended for the use of "bulk" users (J.A. 434a). It dismissed Section IX(A) as procedural only,

without any substantive effect (J.A. 434a). Moreover, it suggested that NBC's requested license, if directed, "might very well import substantial antitrust implications" (J.A. 436a).

Argument

I. Under the Terms of the Amended Consent Decree, ASCAP Cannot Force Bulk Music Users to Take a License for Its Entire Repertory, Where It Effectively Deters Competition Between Individual ASCAP Members.

Within the framework of this appeal, NBC's right to obtain a license for a selected portion of ASCAP's total repertory depends exclusively upon the provisions of the 1950 Amended Consent Decree. *United States* v. *ASCAP (Shenandoah)*, 331 F.2d 117, 123-124 (C.A. 2, 1964). And, construction of the decree "must be discerned within its four corners" in order to determine the bargain struck by the contending parties. *United States* v. *Armour & Co.*, 39 U.S.L. Week 4614 (O.T. 1970, No. 759, June 1, 1971). This the district court did not do. Rather it focused narrowly upon isolated provisions of the decree, without placing its provisions in their proper context. When viewed as a whole, against the background of the problem which necessitated the 1950 Amendment, it is clear that this decree prohibits ASCAP from imposing licenses for its entire repertory in interference with direct licensing between users and its members.

As this Court stated in *Shenandoah, supra* (331 F.2d at 121):

> The Amended Final Judgment (in this case) of March 14, 1950, considerably amplified an earlier con-

sent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948) and M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948).

Alden-Rochelle was an action by movie exhibitors for an injunction against ASCAP's practice of separately licensing synchronization of compositions in sound tracks of motion pictures and the performing rights for those works. In effect the exhibitors wanted the performing rights included with the film rights—i.e., licensed at the source—in order to avoid the necessity of paying ASCAP for a blanket license in addition to their costs for film rights. Motion picture producers, who then participated in ASCAP revenues through their publisher subsidiaries, routinely discriminated between non-ASCAP and ASCAP works. As to non-ASCAP compositions they would insist upon both synchronization and performance rights; but, under their arrangement with ASCAP, which held the non-dramatic rights of its members' copyrighted music, they could only receive synchronization rights. Since ASCAP works were used in most films, an exhibitor had no choice but to accept an ASCAP blanket license.

The district court found both ASCAP's structure and practices in licensing motion picture theatres rife with

antitrust violations. Its key findings were that (80 F. Supp., at 894):

> The combination of the members of ASCAP in transferring all their non-dramatic performing rights to ASCAP is a combination in restraint of interstate trade and commerce, which is prohibited by § 1 of the antitrust laws. It restrains competition among the members of ASCAP in marketing the performing rights of their copyrighted works. And by barring a member from assigning the performing rights to the motion picture producer at the same time that the recording right is assigned, the channels in which the films may be marketed is narrowed to those exhibitors who have a license from ASCAP covering the performing rights of the ASCAP music synchronized on the film.

And it further held (80 F. Supp., at 895):

> Where the power to fix prices is created by an agreement among those who control a substantial part of an industry and who should do business on a competitive basis in a free market, the reasonableness of the prices or the good intentions of the combining units would not absolve them from the charge that they have violated the antitrust laws.

The basic principle that ASCAP cannot exploit pooled copyrights to stifle competition between the individual works of its members was emphasized in *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), which passed on the identical practices under review in *Alden-Rochelle*. The court there found that "[f]ree competition among the members of ASCAP to license individually their

music is effectively curbed, if not completely obliterated, by the scheme of operation which the members of ASCAP have adopted." 80 F. Supp. at 847. It concluded that "[c]ompetition is effectually restrained because all licenses are granted by ASCAP under its control and domination." 80 F. Supp. at 849.

It was in light of these decisions that the 1950 Amended Decree was negotiated.[3] And the provisions designed to meet the restraints on individual licensing, which they unearthed, cannot be construed narrowly. *Alden-Rochelle* and *M. Witmark* exposed the vulnerability of ASCAP to collateral antitrust attack in any situation where its collective activities needlessly cut off individual licensing and the competition between individual works that individual bargaining necessarily engenders. See Timberg, *supra*, at 301. The provisions adopted in the Amended Decree reflect this basic understanding of the parties, and the decree broadly preserves the opportunity for licensing on an individual basis. Thus, Section IV(A) permits ASCAP to accept only non-exclusive rights, leaving its members free to license their works independently; Section VI makes possible individual licensing where the member or members of interest cannot be reached; and, Section IV(B) expressly prohibits ASCAP from "[l]imiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance . . . ."

The refusal to deal under the circumstances of this case does interfere with individual licensing with at least one of the anticompetitive effects condemned in *Alden-Rochelle*

[3] In fact, the same provisions were substituted for the judgment in *Alden-Rochelle*. Timberg, "The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950", 19 Law & Contemporary Problems 294, 301 (1954).

and *M. Witmark*—i.e., elimination of price competition. As those decisions effectively demonstrate, the legitimate ambit of ASCAP's normal activities lies precariously close to *per se* violations of the antitrust laws. ASCAP's collective marketing activities have been tolerated largely because composers and publishers individually are unable to do the policing necessary to enforce their evanescent performing rights. Shull, "Collecting Collectively: ASCAP's Perennial Dilemma," 7 Copyright L. Symposium 35 (1956). And the principal justification for licensing ASCAP's entire repertory is that the typical user is unable to bargain individually for performing rights with widely dispersed composers and publishers and still provide the program flexibility he requires. Timberg, *supra*, at 297. To the extent that joint activity is necessary to make the market function at all, there is ample precedent for accommodation of the joint marketing arrangement under the antitrust laws. See *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals Inc.* v. *United States*, 288 U.S. 344; *Chicago Board of Trade* v. *United States*, 246 U.S. 231. But by the same token, where individual dealing is possible, the limited justification for collective action is removed and the joint activity must be subjected to traditional antitrust analysis.

The decree provisions protecting individual licensing draw precisely this distinction. In the words of one well-informed commentator (Timberg, *supra*, at 320):

> While the Amended Consent Judgment vindicates an ASCAP member's rights to license performing rights even while a member of ASCAP, this legal vindication may well be meaningless economically. The fundamental premise underlying ASCAP's continued existence and acceptability to users was that ASCAP's users

needed immediate access to ASCAP's entire range of compositions, and that it was impracticable for them to negotiate with individual writers and publishers. Nevertheless, should economic circumstances ever be propitious for the exercise of this right of individual licensing, its legal basis has been firmly established in the Amended Consent Judgment.[4]

Moreover, the right to deal individually cannot be exclusively that of the copyright holders. In *Alden-Rochelle* and *M. Witmark,* ASCAP members were the primary beneficiaries of the refusal to license individual performing rights. It could hardly have been solely to protect them that those decree provisions designed to preserve individual dealing were written; rather it is clear that the parties understood that the provisions are to preserve opportunities for competition.

Whether or not circumstances are "propitious" for NBC to engage in individual licensing is in the first instance a decision NBC, not ASCAP or the district court, must make. NBC here proposes to administer its own repertory of compositions with the aid of a "nucleus license" from ASCAP, which it proposes to augment on an individual basis according to its needs. *Reply Memorandum on Behalf of National Broadcasting Company, Inc.,* July 10, 1970, pp. 11-13. There is no reason to believe that NBC lacks the staff or expertise necessary to determine its

[4] Moreover, at least one other commentator shares Timberg's view and concludes that in the wake of the Amended Decree (Shull, *supra* at 53): "ASCAP can no longer demand that a licensee take the whole portfolio and it must license on a per piece basis whenever requested to do so." Clearly the parties to the decree contemplated licensing on this basis, as Section IX(A) expressly refers to applications for "any, some or all of the compositions in the ASCAP repertory."

music requirements and acquire a repertory to meet its needs. But its incentive to do so is obviously affected by ASCAP's willingness to cooperate in that effort. In the first place, Section VI provides the only basis available for licensing works owned by inaccessible ASCAP members. Even ASCAP probably would be unable to obtain licenses for an appreciable part of its repertory if it had to actually contact individually its widely dispersed membership to do so. And the need to obtain rights to the inaccessible segment is probably crucial for NBC's purposes. Secondly, it is obviously true that the more NBC can include in its "nucleus license" the less administrative burden it assumes and the greater the likelihood that it will undertake the effort. Thus, unless NBC has ASCAP's cooperation, it will, as a practical matter, be forced to accept a license for ASCAP's entire repertory. Quite obviously it will have no logical incentive thereafter to bargain for individual rights it already has under a blanket or per program ASCAP license. This makes a refusal to deal for less than ASCAP's entire repertory an effective interference with individual licensing in clear violation of the express terms of Section IV(A); and, the necessary effect is that the dominance of ASCAP, based upon its authority to license pooled copyrighted works, is being used to eliminate price competition between individual ASCAP compositions.

In our view this is not a "package licensing" problem, at least in the same sense as *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948) and *United States* v. *Loew's, Inc.,* 371 U.S. 38 (1962), relied upon heavily by NBC before the district court. *Reply Memorandum of National Broadcasting Company, Inc.,* May 1, 1970, pp. 2-5. Those cases involved instances of group licensing of copyrighted

feature films. The licensee in each case was found to take, use, and pay for films he did not want and that were presumably of inferior quality. The tied films did not compete with each other in any sense of the word, but were simply gaining a free ride on the market power of one or more desired features.

This is not the case here. At the time a license fee is determined, it is not contemplated that the licensee will use ASCAP's entire repertory. This is evident from the fact that under Section XI of the Amended Decree, primary consideration in the distribution of fees collected by ASCAP must be given to the number of performances received by a member's works as determined by objective surveys. See generally *United States* v. *ASCAP (Zekley)*, Nos. 871-874 (C.A. 2, May 7, 1971). What happens is that a licensee pays for the right to use any number of works in ASCAP's repertory, but can freely choose among them. The works thus do compete on their intrinsic merits; and, their owners, as a basic proposition, are compensated only to the extent that their compositions are actually used.[5] But what is eliminated under a license for

[5] What *is* arguably tied to desired compositions is the protection against copyright infringement that comes from holding the rights to use ASCAP's entire repertory. ASCAP has argued that this justifies its refusal to deal here on NBC's terms. *E.g.*, J.A. 279a-280a. But the protection thus afforded is limited, since ASCAP does not control all copyrighted music. Moreover, there is no reason to believe that the problem of chance infringements —that may occur from live broadcasts of events and performances not entirely under NBC's control—cannot be worked out separately. In any event this speculative problem cannot afford a sufficient basis for a judicially engrafted exception to the antitrust laws.

For similar reasons, arguments that group licensing is necessary as a countervailing force to NBC's superior bargaining power are not apposite here. See J.A. 273a-279a. These contentions are rooted in a philosophy of protectionism which is at odds with poli-

ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940).

We recognize, of course, that the question before this Court is what the decree requires, not the broader antitrust consequences of ASCAP's refusal to negotiate a license for less than its entire repertory. It is our posi-

cies favoring free competition which are fostered by the antitrust laws. In the rare instances when competitive imbalance or other policy interests have been found to require protection of any group —for example, fair trade laws and the labor exemption from antitrust—this decision has been made by the legislature, not the judiciary. If ASCAP members must be insulated from price competition among themselves, that protection should be framed by Congress, not by an antitrust court interpreting and enforcing a decree intended to promote competition. And, of course, should NBC abuse its economic power in dealing for performing rights, that might well be an appropriate matter for a separate action under the antitrust laws.

NBC's proposal to create competition for ASCAP music has the potential to benefit more than NBC. The experience gained from competitive pricing should provide a basis for fee determination in instances where users are themselves unable to engage in direct bargaining for individual works.

tion that these antitrust issues were the direct concern of the parties in negotiating the 1950 Amended Consent Decree, having been squarely raised by the decisions in *Alden-Rochelle* and *M. Witmark, supra.* The resulting decree was intended to preserve opportunities for price competition by guaranteeing the right to bargain for individual licenses.

II. This Case Is Not Controlled by This Court's Decision in Shenandoah.

The instant case is distinguishable from this Court's decision in *Shenandoah, supra.* There local broadcasters attempted to force ASCAP to issue a license limited to programs they produced and originated themselves. There was no dispute over the number of compositions to be included in their requested license. Networks already held licenses under Section V that made separate licenses for local stations using network material unnecessary. The local stations wanted to compel their other sources of programing to do the same by obtaining licenses for performing rights when they paid for sound track synchronization rights. The Court found that Section V requires ASCAP only "to grant licenses that will *permit* networks and producers to clear at the source; it does not benefit local broadcasters and there is no requirement that they be offered this additional protection." 331 F.2d at 123 (emphasis in original). It concluded that Section VII alone defines the rights of local broadcasters and requires ASCAP only to issue per program licenses and to assure that such licenses represent "a genuine economic choice" *vis-a-vis* a blanket license. 331 F.2d at 122-123. It construed Section IX(A) as procedural only and Section VI as a general provision that does not override "the specific and detailed provisions relating to television stations, networks and producers." 331 F.2d at 124. The Court thus found that the precise question raised was controlled by "specific and detailed" provisions that defined ASCAP's obligations and barred, by necessary implication, the interpretation urged by the local broadcasters.

Here there are no specific provisions that exclude, by implication or otherwise, an obligation to license on a partial repertory basis. Section V, contrary to the district court's holding, does not in any way relate to partial repertory licenses. That section, as *Shenandoah* held, is concerned with the right of networks and producers to obtain licenses for their programing which include the right for simultaneous and delayed broadcasts on local stations. 331 F.2d at 123. It does not address itself at all to the number of compositions that must be licensed. And Section VII clearly is intended only to require that ASCAP issue licenses that are based upon actual use:[6] that certainly is not inconsistent with what NBC seeks here. What NBC desires is to use Section VI to obtain a "nucleus license" upon which they may build through competitive bargaining. This Court stated in *Shenandoah* that (331 F.2d at 124):

> . . . what [Section VI] says is that ASCAP must place itself in a position where, without the members' assent, it can grant the request of any applicant who wants the whole ASCAP repertory but that it may not grant a license for particular compositions without the member's request or notice to him.

---

[6] Otherwise ASCAP could extend the lawful copyright monopoly by imposing charges unrelated to actual use. Compare *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 131-141 (1969).

Appendix

This construction is fully consistent with the interpretation urged here: that ASCAP cannot interfere with individual licensing, which it does, in violation of Section IV (A), by refusing to use Section VI to comply with NBC's request.

CONCLUSION

For the foregoing reasons, the judgment below should be set aside, and the case remanded to the district court with directions that it order ASCAP to ascertain its authority to license the individual works of its members, as requested by NBC, in accordance with Section VI of the Amended Consent Decree, and to determine a reasonable fee in accordance with Section IX(A) for such compositions as ASCAP may thus become authorized to license.

Respectfully submitted,

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JULY 1971.

APPENDIX

Section IV of the 1950 Amended Consent Judgment provides:

> Defendant ASCAP is hereby enjoined and restrained from:
>
> (A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;
>
> (B) Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance;
>
> (C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated;
>
> (D) Hereafter granting any license for rights of public performance in excess of five years' duration, except for motion picture performance rights which are licensed pursuant to Section V (C) of this Judgment;
>
> (E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;
>
> (F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copy-

right infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;

(G) Restricting the right of any member to withdraw from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing betwneen ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;

(H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances, or the value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

Section V of the 1950 Amended Consent Judgement provides:

> Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory as follows:
>
> (A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting, or simultaneous performance by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;
>
> (B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription

or recordation by all radio stations or television stations in the United States enumerated by the licensee, without requiring separate licenses for such enumerated stations for such performance;

(C) To any person engaged in producing motion pictures (herein referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with the following requirements and in accordance with all other provisions of this Judgment not inconsistent therewith:

(1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;

(2) Upon written request of any motion picture producer such licenses shall be issued on a "per film" basis for the compositions in such film which are in the ASCAP repertory;

(3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;

(4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP

and has paid a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such producer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;

(5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

Section VI of the 1950 Amended Consent Judgment provides:

> Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such

member shall have failed to reply within thirty (30) days thereafter.

Section VII of the 1950 Amended Consent Judgment provides:

> Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:
>
> (A) Enjoined and restrained from issuing any license, the fee for which
>
> (1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or
>
> (2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,
>
> unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;
>
> (B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which
>
> (1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,
>
> (2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and
>
> (3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;
>
> (C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

Section IX of the 1950 Amended Consent Judgment provides:

> (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writ-

ing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this judgment be construed as importing any validity or value to any of said copyrights.

Section XI of the 1950 Amended Consent Judgment provides:

> Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 1971, I deposited in the United States mail, postage prepaid, two copies of the attached Brief of Plaintiff, United States of America, and one copy of the attached Motion to File Brief, addressed to each of the counsel for Defendant-Appellee and Applicant-Appellant listed below:

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MOTION FILED
DEC 18 1978

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*, *Petitioners*,

COLUMBIA BROADCASTING SYSTEM, INC., *Respondent*.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*, *Petitioners*,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF NATIONAL RELIGIOUS BROADCASTERS, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

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MOTION OF NATIONAL RELIGIOUS BROADCASTERS, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of this Court, National Religious Broadcasters, Inc. (NRB) moves for leave to file a brief *amicus curiae* in the above-entitled consolidated cases. Counsel for the Respondent in both of the above-entitled

cases has consented to the filing of the attached brief.* Counsel for Petitioners have not.

Interest of *Amicus Curiae*

NRB is a non-profit tax-exempt corporation composed of approximately 850 organizational members who own and operate television and radio stations in all 50 states, the District of Columbia, Puerto Rico and Guam and/or produce programs for broadcast and cablecast. It was formed in 1944 in order to contribute to the improvement of religious broadcasting so that it better serve the public interest and more effectively minister to the spiritual welfare of the nation.

Virtually every radio and television licensee member of NRB faces the problem that Respondent has with Petitioners and which is the subject of this proceeding. Notwithstanding that NRB's members perform largely or only gospel, sacred and inspirational music on their broadcast stations, in order to ensure freedom from infringement of copyright suits they must purchase from Petitioners blanket licenses to perform the entire repertory of each. The price exacted is fixed by Petitioners and their affiliates and members in the same way as Respondent here complains is in violation of Section I of the Sherman Act.

The present case raises several issues, the resolution of which NRB believes it is so situated as to be of substantial assistance to the Court. By and large NRB represents small stations whereas Respondent is the giant of the industry. Nevertheless their interests are parallel. Moreover, since this Court will be asked to rule for the first time as to whether a "market functioning" exception exists as to the *per se* illegality of price-fixing, NRB demonstrates in its Brief that once the price-fixing schemes complained of herein are

*The letter of consent has been lodged with the Clerk of the Court.

broken up, at least so much of the market as concerns NRB stations will function quite readily.

We believe it will be particularly helpful to the Court to have the views of the smaller members of the broadcast industry.

Respectfully submitted,

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BRIEF FOR NATIONAL RELIGIOUS BROADCASTERS, INC. AS *AMICUS CURIAE*

National Religious Broadcasters, Inc. (NRB) as *Amicus Curiae*, urges the Court to affirm the judgment of the United States Court of Appeals for the Second Circuit for the reasons set forth in this Brief.

Interest of Amicus Curiae

The interest of Amicus Curiae is stated in the Motion for Leave to File, *ante*.

Questions Presented

1. Whether it is illegal *per se* under Section I of the Sherman Act for copyright holders of non-dramatic performance rights in musical compositions — who would otherwise compete with one another — to universally agree to have a sales committee market their products at a price formula fixed by that committee?

2. Whether the market in non-dramatic performance rights of musical compositions will function when price-fixing is removed therefrom?

3. Whether there is such a thing as a "market functioning" exception to the rule that price-fixing is illegal *per se*?

4. Whether the Court of Appeals has directed the District Court to fashion a remedy that is reviewable, much less illegal?

Statement of the Case

Columbia Broadcasting System, Inc. (CBS) filed this anti-trust action against the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI)

and certain of their members and affiliates (as a class), which members and affiliates are writers and publishers of musical compositions. In order to perform any copyrighted musical composition, the user—such as the CBS Television Network, individual television and radio stations, and concert promoters—must obtain the non-dramatic performance rights in the compositions to be performed. ASCAP is an unincorporated association of creators and publishers of music whose members have granted to it the non-exclusive right to license the public performance of their compositions. BMI is a corporation which was organized for the same purpose.

ASCAP and BMI only issue blanket licenses, meaning that the user can only buy from ASCAP and BMI the right to perform all of the compositions in their respective repertories. Thus, if CBS were to purchase from ASCAP the right to perform the music from Mass by Leonard Bernstein, it would also be required to purchase the rights to performance of, among others, every acid rock, country, and rhythm and blues composition that ASCAP is authorized to license. The same is true of BMI. The only choice a user has when dealing with ASCAP or BMI is whether to buy the rights to their entire repertories for unlimited performance any or all of the time during the license period or whether to buy their entire repertories for use only on specific programs. In neither event is the price negotiable, it having already been fixed by formula by ASCAP and BMI.[1] For these rights, the user, here CBS, pays a fixed percentage of its income regardless of the number of uses it makes of copyrighted works. Moreover, while the individual members and affiliates of ASCAP and BMI retain the right to license their works independent of

1. As to ASCAP alone, if price is disputed, the user can apply to the United States District Court for the Southern District of New York in order that the court fix the price. But that has never happened. (Pet. A. 18a n. 23, 30a-31a).

ASCAP and BMI, were that to happen the user would receive from ASCAP and BMI no reduction in the fee payable for the unlimited blanket license. (Pet. A. 6a-7a). So, too, it is under a per-program blanket license, where, even worse," [i]t does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same." (Pet. A. 7a n.9).

ASCAP and BMI take considerable pride in controlling the music market with ASCAP noting in its brief that it "today has 16,000 writer and 6,000 publisher members..." and "licenses also on behalf of the hundreds of thousands of members of some 30 affiliated foreign societies." ASCAP Br. at 6-7. Similarly, BMI lays claim to "more than 33,000 composers and authors of music and more than 16,000 music publishing companies permitting BMI to offer licenses to perform their works." BMI Br. at 3. While it is true that ASCAP and BMI speak on behalf of thousands of writers and composers, all of whom have delegated to ASCAP or BMI the right to determine pricing, it is also true that a direct negotiation market with individual copyright owners is practical, as both the District Court and the Court of Appeals determined, (Pet. A. 8a-9a), at least if fixed prices are removed as an obstacle.

The District Court regarded the case as principally a tie-in or block-booking one which required proof of coercion in order for illegality to be established. Because direct licensing is available, the scheme, it found, was not coercive and therefore not illegal. (Pet. A. 8a). It also concluded that there was no unlawful price-fixing inasmuch as the copyright owners retained their right to deal directly at "negotiated price[s] for each license" (absent a showing that the copyright owners forced the users to accept the ASCAP or BMI fixed price.) (Pet. A. 114a-115a). On the issue of price-fixing the Second Circuit reversed, also finding copyright misuse. (Pet. A. 21a and 23a n.29).

Summary of Argument

In order to perform any copyrighted musical composition, the user — such as the CBS Television Network, individual television and radio stations, and concert promoters — must obtain the non-dramatic performance rights in the compositions to be performed. The writers and composers of these works (often through their publishers) sign away to ASCAP and BMI the right to license their works *and to set the prices therefor*. After this is done a small group of individuals at ASCAP and BMI fix upon a percentage of gross income which they then demand of all networks and broadcast stations that wish to play any music which appears in the ASCAP or BMI repertory. Since most music does appear in one of the two repertories, both licenses are compulsory in order to avoid copyright infringements. In the normal market situation, these authors and composers would compete with one another as to price and exposure on the television networks and throughout the broadcast industry. However, they have here accepted the invitation to participate in a plan the necessary consequence of which is the fixing of prices for the performance of their works.

Price-fixing is illegal *per se* as set forth by this Court in *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940). That the plans call for prices to be fixed by various formulae so that they are not uniform and inflexible does not save them from constituting price-fixing. The price-fixing would have had a very significant influence on the prices that might have been obtained had CBS negotiated directly with the composers, authors or publishers holding the copyrights — which theoretically CBS legally could have done. Since the price-fixing has "clearly curtailed" competition it falls within the evils of *Socony-Vacuum*.

If price-fixing is eliminated, the evidence suggests there is every reason to believe that the market will function quite well. Agencies which presently handle the marketing of other rights arising under copyrights of musical works could

expand their operations into the marketing of performance rights; handling them, too, in legal and legitimate ways. Alternatively, absent being locked out of the market, marketing entities for performance rights similar to advertising agencies would enter the field. Not only was the Second Circuit's apparent fear of disrupting the broadcast and music performance rights industries unfounded, its creation of a "market functioning" exception to the *per se* rule against price-fixing has no support in the law and should be put to rest.

Finally the Court of Appeals has not directed the District Court to fashion a remedy that is now reviewable, much less illegal. As a practical matter if price-fixing is eliminated from the market, the blanket license as it is presently known could not continue to exist. But that is not to say that a full line of compositions, i.e., a blanket license, could not be fashioned for those who wish to purchase it, and in such a way as does not involve a conspiracy to fix prices.

ARGUMENT

I

Blanket Licenses as Presently Offered by ASCAP and BMI are Price-Fixing and are *Per Se* Illegal

The blanket licensing scheme engaged in by ASCAP, BMI and their members and affiliates is perhaps the most pervasive example of price-fixing ever to confront this Court. To be sure, the record in this case only covers price-fixing as to CBS. But the entire industry is subject to the same abuses that confront CBS.

The fact of the matter is thousands of writers and composers (often through their publishers) sign away to ASCAP and BMI the right to license their works *and to set the prices therefor*, whereupon a small group of individuals at

ASCAP and BMI fix upon a percentage of gross income which they then demand of all networks and broadcast stations that wish to play any music (including that in commercials) which appears in the ASCAP or BMI repertories. Since most music does appear in one of the two repertories, *both* licenses are compulsory in order to avoid copyright infringement suits. (Pet. A. 22a, 27a). ASCAP and BMI are not distributorships or common sales agencies, they are devices whereby competitors abdicate to a small band of people all pricing responsibility, which band then comes up with one price formula for all of the works of all of its members or affiliates.

Section 1 of the Sherman Act[2] provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among these several States, or with foreign nations, is declared to be illegal...." ASCAP advances the novel theory that because its members do not assemble to conduct the price-fixing, they do not fix prices. ASCAP Br. at 26. That argument is simplistic and finds no support in the history of antitrust law. This Court held in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939):

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schneck* v. *United States*, 253 F. 212, 213, *aff'd.*, 249 U.S. 47; *Levey* v. *United States*, 92 F. 2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Ass'n* v. *United States*, 234 U.S. 600; *Lawlor* v. *Loewe*, 235 U.S. 522, 534; *American Column Co.* v. *United States*, 257 U.S. 377; *United States* v. *American Linseed Oil Co.*, 262 U.S. 371.

306 U.S. at 227.

2. 15 U.S.C. § 1.

It is the participation by ASCAP's and BMI's members and affiliates — who would otherwise compete with one another as to price and exposure — in the plan restraining interstate commerce that constitutes the illegal combination complained of in this action. It is not necessary that a convocation be held at which each member or affiliate votes on a proposed price or method of distribution of proceeds. *Id.*

ASCAP's definition of price-fixing, reading out utilization of a formula with which to fix prices, is similarly without support in the antitrust law. That issue was addressed by this Court in *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940) where the fact that the prices that a combination paid "were not fixed in the sense that they were uniform and inflexible" was characterized as unimportant. *Id.* at 222.

> An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used.
>
> * * *
>
> Hence prices are fixed within the meaning of the *Trenton Potteries* [273 U.S. 392 (1927)] case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, *or if by various formulae* they are related to the market prices. They are fixed because they are agreed upon. *Id.* (Emphasis supplied).

There is here no question about how ASCAP and BMI operate. A formula is devised to determine how much CBS (and every other performance licensee) owes each licensing organization. Thus, ASCAP's argument that its members do

not engage in conduct "the purpose and necessary effect of which is to fix and maintain prices" (ASCAP Br. at 26) is completely without merit. Both necessary determinants to price-fixing by ASCAP, BMI and their members and affiliates are here present: (1) otherwise competing creators have agreed upon a plan (2) which fixes a uniform formula that exacts a price from CBS and every other music user. Thus we have price-fixing and its recognition by the Second Circuit was clearly correct.

BMI has framed the issues in a way that is legally irrelevant to this case. It takes a starting point the fact that a television network, including CBS, wishing to perform any musical selection in the repertory of BMI could obtain a performance license from the individual copyright owner, bypassing BMI, and then asks, in the light of the foregoing, whether the offering by BMI of an alternative in the form of a blanket license is *per se* unlawful price-fixing. BMI Br. at 3. As framed, for BMI's issue to be answered affirmatively, it would depend upon the failure of the bypassing. While industry-wide, BMI's offer of blanket licenses is eminently successful, it makes no difference that the television networks might be able to deal directly with copyright owners. As was said in *Internatioanl Salt Co., Inc.* v. *United States*, 332 U. S. 392 (1947): "under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemming the direction of the movement." *Id.* at 396.

Nor is it important that the blanket license scheme is not the only method by which the television networks could do business. This Court's teaching in *Socony-Vacuum* is instructive:

> the fact that sales on the spot markets were still governed by some competition is of no consequence. For it is indisputable that that competition was restricted through the removal by

> respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets.
>
> * * *
>
> Competition was not eliminated from the market; but it was clearly curtailed...." 310 U.S. at 220.

The mere fact that there may exist a way around the price-fixing machinery simply has no bearing on the issue of whether that machinery is price-fixing. As was the case in *National Society of Professional Engineers* v. *United States*, _____ *U. S.* _____, 55 L. Ed. 2d 637, 644 (1978) "the asserted defense rests on a fundamental misunderstanding ..." of the law. Whether there are one, two or three alternatives to dealing with price-fixers does not make them any the less price-fixers for "the test is not what the actual effect is on prices, but whether such agreements interfere with 'the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' " *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F. 2d 128, 132 (9th Cir. 1960).[3] Even if asked to negotiate directly, the copyright owners' price quotations would be influenced by the prices they receive pursuant to their concert of action in blanket situations, (Pet. A. 11a-12a), thus falling within *Plymouth Dealers' Ass'n.*

ASCAP also misses the point by attempting to inject the rule of reason, common sales agencies, coercion or lack thereof and vertical restraints into its defense. As the 9th Circuit recognized in *Plymouth Dealers Ass'n, supra*, that while there sometimes exists a question as to whether certain acts do or do not constitute *per se* violations, there is never any question "but that fixing prices is one of the three most readily recognized and generally acknowledged *per se*

3. Quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951)

violations..." 279 F. 2d at 131. Once it may be determined that an agreement to fix prices has come into being "it is conclusively presumed that a conspiracy to restrain trade exists...."*Id.* In *Professional Engineers, supra,* this Court reiterated in April, 1978 the *Socony-Vacuum* thesis that the "central nervous system of the economy" is price and that "an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." 55 L. Ed. 2d at 650.

Amicus agrees with ASCAP that a proper statement of the law is that "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive." ASCAP Br. at 26, quoting *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 344 U.S. 36, 49-50 (1977). But *Continental TV* involved vertical restraints, not price-fixing. Nor are the common sales agency cases apposite. Of the cases ASCAP cites in support of its common sales agency theory, none involved anything like the ASCAP or BMI plans. In *Appalachian Coals, Inc. v. United States,* 288 U.S. 344 (1933), there was confronted a "plan [that] cannot be said either to contemplate or to involve the fixing of market prices." *Id.* at 373. In *Associated Press* v. *United States,* 326 U.S. 1 (1945) there was involved a concerted refusal to deal, not a price-fixing agreement, whereby certain "publishers have, by concerted arrangements, pooled their power to acquire, to purchase, and to dispose of news reports through the channels of commerce." *Id.* at 16. In *Board of Trade of the City of Chicago* v. *United States,* 246 U.S. 231 (1918) the commodity exchange adopted a rule which was a "restriction ... upon the period of price-making," *id.* at 239, and "had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago." *Id.* at 240.

Similarly unavailing are the *Hazeltine* cases, for neither involved price-fixing. In *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950) there was involved a contractual relationship between two parties only. Petitioner tried and failed to establish an antitrust theory

under this Court's tie-in cases but "the question[] for determination [is] whether a misuse of patents has been shown," *id.* at 830[4] where Automatic Radio contracted to use any or all of Hazeltine Research's patents in the manufacture of its products and for which Automatic Radio agreed to pay Hazeltine Research a percentage of the former's selling price of each radio receiver or $10,000 per year, whichever was greater. *Automatic Radio* is no different from a situation where one composer might authorize CBS to acquire the performance rights to his musical selections only if CBS would buy the rights to them all. But that is not what this case is about. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) there were charges that Hazeltine and its parent corporation had "conspired with the foreign patent pools to exclude Zenith from the Canadian, English and Australian markets." *Id.* at 105. It was also charged that Hazeltine had misused its United States patents "by attempting to coerce Zenith's acceptance of a 5-year package license, and by insisting on extracting royalties from unpatented products. *Id.* In no way, shape or form did *Zenith Radio* involve price-fixing.

Obviously, not every conspiracy in restraint of trade is a conspiracy to fix prices. But the ASCAP and BMI plans are, and they are *per se* illegal. The rule of reason simply has no applicability.

II

The Market Will Function Quite Well if Allowed to Operate Without Restraint; In any Event There is no Such Thing As a "Market Functioning" Exception to the *Per se* Rule

By virtue of the Copyright Act a copyright issued to a composer invests in him the right to determine if and how his

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4. The other question, not here relevant, was whether patent validity could be used as a defense to avoid payment of royalties under an agreement. *Id.*

work will be produced, distributed, performed, displayed or used as a source for derivative works.[5] Of those, the only right subject to a price-fixing scheme is the performance right. All of the other rights arising under a copyright are marketed in legal and legitimate ways and there is no reason why the performance rights cannot be handled the same way. Moreover, there is no reason to suspect that ASCAP and BMI could not, if they so chose, continue to operate in the licensing of performance rights without engaging in price-fixing. The Second Circuit's decision does not in any way foreshadow the doom of ASCAP or BMI — but is going to make them reform.

At trial, a great deal of evidence was adduced as to whether the market would function if CBS bypassed ASCAP and BMI. The District Court concluded it would (Pet. A. 112a) and this finding was left undisturbed by the Second Circuit. (Pet. A. 10a). No one expects CBS to start contacting thousands of individual writers and composers. As a practical matter, the television synchronization rights (meaning the right to put, or synchronize, music onto video tape for television purposes) are already handled by an independent agency in Los Angeles, California. If price-fixing were eliminated it would be easy enough to purchase the performance rights at the same time that synchronization rights are purchased. (Pet. A. 67a-68a, 72a-76a). That agency neither fixes prices nor requires a buyer to buy all the synchronization rights of the writers and composers it handles. Moreover, the evidence firmly establishes that publishing houses are eager to have their works performed and would line up at CBS's door. (Pet. A. 112a). As the Court of Appeals correctly noted "[t]he upshot is that, as a practical matter, the networks would generally deal with publishers or through brokers or agencies of the publisher, rather than composers." (Pet. A. 10a).

There is no reason to believe in either radio or television

5. 1 Nimmer, Copyright, Sections 100-108 (1976).

that market machinery similar to that for advertising[6] will not immediately spring up once ASCAP's and BMI's price-fixing schemes are finally declared illegal — and ASCAP and BMI will be in an excellent position to transform themselves rather than allow the field to go to competitors. In any event, producers of goods and services deal with advertising agencies who in turn deal with radio and television stations across the country. In dealing with an advertising agency, a middle man, no price-fixing is involved, and need not be in performance rights licensing.

In the field of gospel and sacred music, if ASCAP and BMI fail to set up the machinery to license the performance rights of the authors and composers of that type of music, there are innumerable record and music publishing companies ready to pick up the mantle. For those stations that wish blanket licenses in order to be able to play any and all kinds of music without worrying about possible infringement, there is nothing in the Second Circuit's opinion foreclosing that. ASCAP and BMI could still offer blanket licenses, they just could not do it by means of first fixing prices.

Apparently of the belief that its ruling would disrupt the entire broadcast and performance licensing industries, the Second Circuit proceeded to create a "market functioning" exception to the *per se* rule against price-fixing. It relied on the Ninth Circuit's decision in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F. 2d 1 (9th Cir. 1967), cert. denied, 389 U. S. 1045 (1968) and in particular, on the Solicitor General's brief amicus curiae in support of certiorari. However, *K-91* involved a copyright infringement action brought by several ASCAP members against a single radio broadcaster where it was recognized by the parties that for a single radio station "there was a market need for blanket licensing" and where it had been stipulated that "[i]t would be commercially,

6. Of course placement of advertising is different from performance rights licensing in that the money flows in the opposite direction.

practically and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations." (Pet. A 14a). It may very well be true, and probably is, that no one broadcaster, in radio or television, could go outside the present licensing system and expect to be successful. But that is simply not the way it would happen, as we have seen. Once an entrepreneur can envision that he will not be locked out of a market by an illegal price-fixing scheme, common sense dictates he will enter that market and provide the absent services.

In any event, it was wholly improper for the Second Circuit to reach for a stipulation in another case involving wholly different circumstances and theories of law in order to create a rule of law. In creating the market functioning exception, the Second Circuit purported to rely upon four cases, three of which[7] were decided before the seminal case of *Socony-Vacuum* and the fourth of which[8] involved only a concerted refusal to deal and, moreover, does not begin to support creation of a market functioning exception.

In *Appalachian Coals* there was involved price-fixing by a limited segment of coal producers in Appalachia but as noted *supra*, the fixing of market prices was impossible and was not contemplated under the plan. 288 U.S. at 373. That is hardly the case with ASCAP and BMI. In a well-reasoned Note in the *Yale Law Journal* commenting on the Second Circuit's decision in this case, it is pointed out that "[t]he modern rule against price fixing, however, is a direct repudiation of the reasoning of *Appalachian Coals*. The linchpin of *Socony-Vacuum* is the statement that whatever the economic

7. United States v. St. Louis Terminal, 224 U.S. 383 (1912); Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

8. Associated Press v. United States, 326 U.S. 1 (1945).

justification for particular agreements, the law does not permit an inquiry into their reasonableness." 87 Yale L.J. 783, 799 (1978). Amicus agrees and submits that there is no such thing as a market functioning exception to the rule that price-fixing is *per se* illegal.

III

The Court of Appeals has not Directed the District Court to Fashion a Remedy that is Reviewable, much less Illegal

Unquestionably, under the present market structure "the very availability of the blanket license itself involves the fixing of a collective price ..." (Pet. A. 20a) which is price-fixing. Merely because price-fixing and the blanket license are presently synonymous does not mean that they must remain so for all time. When a magazine distributor offers a full line of publications he has not, by that fact alone, conspired with his publishers (nor have they conspired among themselves) to fix prices.

Inasmuch as no remedy has yet been fashioned, there is nothing for this Court to review. The Court certainly should not assume that the District Court will fashion a remedy that continues to countenance price-fixing. In essence, that would be the reverse of what the Second Circuit directed. (Pet. A. 21a).

CONCLUSION

For the foregoing reasons, the judgment entered below by the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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